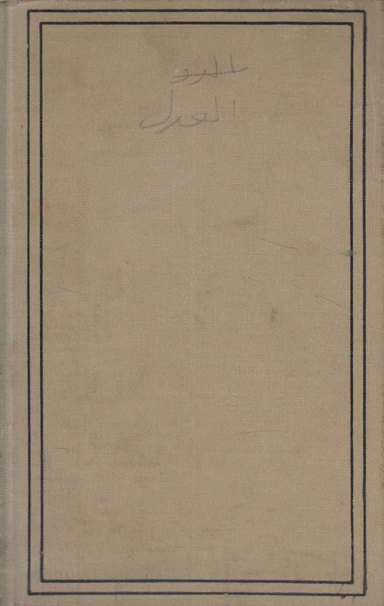


CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

FEBRUARY 1, 1944, TO JUNE 30, 1944

WITH

REPORT OF

DECISIONS OF THE SUPREME COURT

IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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*Recalled April session, 1944.

[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserves, on active duty.

[2] On leave as of September 22, 1943, with War Food Administration.

[3] Temporary Commissioner vice W. Ney Evans, on military leave.

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ORDER RECALLING HON. FENTON W. BOOTH, CHIEF JUSTICE, RETIRED

Order. The Chief Justice having decided that it is necessary to recall Honorable Fenton W. Booth, Chief Justice, Retired, to serve with the Court, and the Honorable Fenton W. Booth, Chief Justice, Retired, having assented,

IT IS HEREBY ORDERED this fifteenth day of March 1944, that Honorable Fenton W. Booth, Chief Justice, Retired, be, and is, hereby made an active member of the Court commencing April first, 1944, until such time as the cases in which he participates are decided.

Under the above order, Honorable Fenton W. Booth, Chief Justice, Retired, participated in certain cases reargued at the April, 1944, session of the Court, as will be more fully shown by the reports of such cases.

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LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE LAW 226—78TH CONGRESS]

[CHAPTER 99—2D SESSION]

[S. 776]

AN ACT

To confer jurisdiction on the Court of Claims to hear, determine, and render judgment on the claim of Louis H. Pink, Superintendent of Insurance of the State of New York, or his statutory successor, as statutory liquidator of New York Indemnity Company, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon the claim of Louis H. Pink, Superintendent of Insurance of the State of New York, or his statutory successor, as statutory liquidator of New York Indemnity Company, against the United States, for remission of liquidated damages assessed against such company as surety under the provisions of contract numbered I–1p–129, dated May 12, 1928, between the United States and Greenwald and Tudor and E. Deffebach, for certain highway construction in Sequoia National Park, California.

SEC. 2. Suit upon such claim may be instituted at any time within six months after the date of enactment of this Act, notwithstanding the lapse of time, laches, or any statute of limitations. Proceedings for the determination of such claim and appeals from, and payment of any judgments thereon shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code as amended.

Approved March 16, 1944.

CASES DECIDED

IN

THE COURT OF CLAIMS

February 1, 1944, to June 30, 1944, and other cases not heretofore published.

MAGNOLIA PETROLEUM COMPANY v. THE UNITED STATES

[No. 45678. Decided January 3, 1944. Plaintiff's motion for new trial overruled April 3, 1944.]*

On the Proofs

Taxes on transportation of petroleum products by pipe line by privately owned facilities; test of liability for.—Where Federal pipe line transportation taxes were assessed against the plaintiff on the conveyance or transportation of its own oil, both crude and refined, from its own tanks on its own premises through its own lines of pipes into vessels at its own wharfs; it is held that such taxes were properly assessed under section 731 of the Revenue Act of 1932, which levies a tax "upon all transportation of crude petroleum and liquid products thereof by pipe line," such service being customarily performed by a pipe line carrier, and plaintiff is not entitled to recover.

Same; tax properly levied.—In the instant case, although no charge was actually made or collected on the conveyance of oil from plaintiff's storage tanks to vessels, the tax was properly levied upon the basis of the charges usually made by pipe line companies for such services, as provided by the statute. (47 Stat. 275.)

Same; intent of Congress.—It was plainly the purpose of Congress to tax movements through privately owned facilities as well as those over common carrier pipe lines, partly for the purpose of avoiding giving advantage, by way of exemption from the tax, to persons owning their own facilities. (*McKeever* v. *Fontenat*, 104 Fed. (2nd) 326, cited.

*Plaintiff's petition for writ of certiorari pending.

Same; test established by Treasury Regulations.—Although under the Treasury Regulations (Article 26 of Regulations 42) promulgated under the 1932 Revenue Act, transportation of oil which is incidental to a business engaged in by the owners of the oil is exempt from the transportation tax, the basic test established by the regulation is whether or not the transportation service upon which the tax is levied is such as is customarily performed by a pipe line carrier.

Same; authority of Commissioner.—Under section 731 (b) of the 1932 Revenue Act the Commissioner of Internal Revenue is authorized to determine what would be a reasonable charge for the transportation of oil, as provided in the Act, only where there are no established bona fide tariffs charged by pipe line carriers for like services. *See National Pipe Line Company* v. *United States*, 99 C. Cls. 180.

The Reporter's statement of the case:

Mr. Raymond M. Myers for the plaintiff. *Mr. Homer Hendricks* was on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a Texas corporation, with its principal place of business at Dallas, Texas. During the periods involved in this proceeding it was, and is now, engaged in the business of producing, refining, and marketing petroleum and petroleum products. It had refineries at Beaumont, Corsicana, Fort Worth, and Luling, Texas, and its marketing operations were conducted in Texas, New Mexico, Oklahoma, Arkansas, and Louisiana. Under its charter, plaintiff could operate no pipe line, and it was not a common carrier; but plaintiff wholly owned the Magnolia Pipe Line Company which was a common carrier pipe-line transportation company and which had the same officers and management as plaintiff.

2. Federal pipe-line transportation taxes were assessed against the plaintiff on the conveyance or transportation of its own oil (both crude and refined) from its own tanks on its own premises through its own lines of pipes into vessels on the river adjoining *a* and *b* below, and into barges on the canals within *c* below, and in sums, as follows:

a. Beaumont Refinery in Texas—	
(1) Taxes and interest paid on the conveyance of refined products into vessels	$74, 883. 50
(2) Taxes and interest on the conveyance of crude oil into vessels	10, 793. 10
b. Magpetco Terminal in Texas—	
(3) Taxes and interest on the conveyance of refined products from the Beaumont refinery to the Magpetco terminal (a distance of 9 miles) and loading the same into vessels	9, 531. 74
(4) Taxes and interest on the conveyance of crude oil into vessels	17, 456. 03
c. Cameron Meadows Lease in Louisiana—	
(5) Taxes and interest on the conveyance of crude oil into barges	2, 030. 63
Total	114, 695. 00

3. The aforesaid taxes were assessed for the calendar years 1933–1936, inclusive, and for the portion of the year 1937 ending April 30. The taxes and interest were paid by plaintiff as follows:

September 16, 1936	$938. 72
March 5, 1938	76, 600. 81
March 18, 1938	36, 594. 10
August 5, 1938	561. 37
Total	114, 695. 00

4. November 1, 1939, the plaintiff filed with the Collector of Internal Revenue at Dallas, Texas, its claim for refund in the amount of $114,695.00. By letter of March 20, 1941, the claim for refund was rejected *in toto* by the Commissioner of Internal Revenue.

5. Among plaintiff's facilities at each of the three places named in finding 2, there were oil tanks and there were pipes through which the oil was carried from tanks into ships and barges. At Beaumont and Magpetco pumps were used to transfer the oil from tanks into ships. At the Cameron Meadows lease the oil flowed from the tanks through pipes into barges by gravity.

The Neches River formed the north boundary of plaintiff's refinery at Beaumont and the wharf from which the products in question were loaded at Beaumont was on land owned by plaintiff.

BEAUMONT REFINERY

6. Plaintiff had a refinery located on the outskirts of Beaumont, Texas, on the banks of the Neches River, which is a navigable stream flowing into the Gulf of Mexico. During the period involved the plant occupied 750 acres. It was a complete refinery at which all the principal petroleum products were manufactured, including gasoline, kerosene, distillate fuel, residual fuel, lubricating oils, and waxes. On the north boundary of the plant is the Neches River, which has a wharf 1,500 feet long with berth space for three vessels. The tanks from which the crude petroleum and refined products were loaded onto vessels at the wharf at Beaumont and at the terminal at Magpetco were about 50 in number. They were arranged in rows of from 4 to 7 tanks each. The closest row was about 400 feet from the wharf and the farthest row was about 2,400 feet from the wharf. They were nine miles from the Magpetco terminal.

7. The crude oil was received at the refinery by pipe line, by barge, and by railroad tank cars. The greater part of the oil was received by pipe line. As the oil arrived it was stored in tanks throughout the refinery according to the location which best controlled its future treatment. It was available for use in the refinery or for sale in its crude state. The crude petroleum sold from these tanks had been in them for varying periods up to a period of as much as several months. The oil was sucked or pumped from tank to still, from tank to tank, from still to tank, to treat, to finish, to mix, to blend, etc., depending on what the finished products were to be. When the desired products had been produced they went to the group of tanks mentioned above.

8. All the crude oil was stored on the refinery premises until the salt and water therein had settled, and until it was required for refining or for sale in its crude state. Some of the crude oil received at the refinery was loaded as such into vessels through the same facilities and over the same wharf as was used for the loading of refined products.

9. The above-mentioned tanks were connected with lines of pipes to a pump house. From the pump house to the wharf there were about a dozen discharge lines, a line for

each type of product handled. Each discharge line was connected to a loading rack located on the wharf. From each loading rack there was a rubber hose from 38 to 40 feet long to carry the oil from the rack into the vessel.

MAGPETCO TERMINAL

10. Magpetco was located down the Neches River south about nine miles from the Beaumont refinery. There was an 8-inch pipe line running from the Beaumont refinery to the Magpetco terminal. The terminal consisted of storage tanks, pipes connecting tanks, pumps, and wharf for the loading of oil from tanks into vessels. The 8-inch pipe line from Beaumont to Magpetco was used exclusively for the transportation of refined products from the refinery to the terminal for storage and for subsequent loading into vessels. The operation of loading oil from tanks into vessels at Magpetco was the same as at Beaumont.

The crude oil which was loaded at Magpetco was received by pipe line from four States in which the plaintiff produced oil. Before being shipped out it had remained in the storage tanks for varying periods up to as much as four or five months. The Magpetco terminal and the Beaumont refinery were under the same management and were operated together as a part of the same business.

CAMERON MEADOWS LEASE

11. The Cameron Meadows lease was located in southern Louisiana in swampy country. The lease was reached by means of canals. The canals were used for the movement by barge of oil produced from the wells. The oil as it came from the wells was placed into settling tanks, where the oil was treated. From the settling tanks the oil was moved by line of pipes to stock tanks, some of which were several thousand feet away. From the stock tanks the oil was transferred to barges through pipes and rubber hose at distances of 150 to 400 feet.

12. The Magnolia Pipe Line Company, plaintiff's subsidiary, had no terminal facilities. Its pipes ended in the one case at plaintiff's refinery at Beaumont, and in the other at plaintiff's terminal at Magpetco. The Magnolia Pipe Line

Company having no terminal facilities did not render the service of loading the oil into vessels. This service was rendered by plaintiff, when required of it, for which it made a charge of 1½ cents per barrel. This service consisted in transporting the oil from its tanks by pipe line and rubber hose into the holds of the vessels.

Other pipe line companies operating in the Beaumont and Magpetco areas made a charge for loading of from 1½ to 2½ cents per barrel.

Pipe line companies operating in the neighborhood of plaintiff's Cameron Meadows lease made a charge for loading of 2½ cents per barrel.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the sum of $114,695, the amount of taxes paid upon the transportation by pipe line of crude petroleum and the refined products thereof, plus interest. Transportation at three places was involved. One was from its storage tanks at its refinery at Beaumont, Texas into vessels at its wharves on the Neches River, which was the north boundary of its plant; another was from its storage tanks at its refinery at Beaumount to its terminal at Magpetco, nine miles down the river from Beaumont; and the third was from its storage tanks on the Cameron Meadows lease in Louisiana into barges. The transportation from the storage tanks at Beaumont was of both refined products and of crude oil. The transportation from the storage tanks at Cameron Meadows was of crude petroleum only.

Section 731 of the Revenue Act of 1932 (47 Stat. 169, 275) levies a tax "upon all transportation of crude petroleum and liquid products thereof by pipe line." The tax is to be paid "by the person furnishing such transportation." In amount it equals 4 percent of the charge made for the transportation or, if the owner of the petroleum products furnishes his own transportation, then the tax is 4 percent of the charge a pipe-line company makes for like service.

The transportation upon which the tax was levied in this

case was from the plaintiff's storage tanks into the holds of vessels. The charge on which the tax was assessed was 1½ cents per barrel where the transportation was from the tanks on the refinery grounds at Beaumont into vessels at the wharf contiguous to the refinery grounds, 2½ cents per barrel where the transportation was from the storage tanks on the refinery grounds to vessels at the wharf at Magpetco, and 2½ cents per barrel where the transportation was from the storage tanks at the Cameron Meadows lease to the vessels in the canal contiguous to the lease.

Transportation from storage tanks into the holds of vessels is a transportation service rendered by pipe-line carriers, and they charge for it rates varying from 1½ cents per barrel to 2½ cents per barrel. They call this a charge for "loading." Presumably the rate from 1½ cents per barrel to 2½ cents per barrel depends upon the distance from the storage tanks to the vessel. If the distance is short a charge of 1½ cents per barrel is made, but if the distance is longer the rates go up to as much as 2½ cents per barrel.

The storage tanks at the Beaumont refinery from which the products were transported to the vessels were about 50 in number. They were arranged in rows of from 4 to 7 tanks. These rows were from about 400 feet to 2,400 feet from plaintiff's wharf. They were about nine miles from the Magpetco terminal. Plaintiff ran its own pipe lines through its own property from the storage tanks to the loading racks at its wharf at Beaumont and it ran its own pipe lines from its storage tanks to its wharf at Magpetco.

Plaintiff says that no pipe-line company ever runs its lines into the refinery grounds of another company and, therefore, no pipe-line company ever renders the service taxed in this case; but all pipe-line companies do make a charge for loading vessels from storage tanks, and this is the transportation upon which the tax was levied in this case. The tax was levied on the charge pipe-line companies make for such transportation. This is in accordance with the Act (Sec. 731 (b)).

It was plainly the purpose of Congress to tax movements through privately owned facilities as well as those over

common carrier pipe lines, partly for the purpose of avoiding giving advantage, by way of exemption from the tax, to persons owning their own facilities. This was the view of the Fifth Circuit Court of Appeals in *McKeever* v. *Fontenot*, 104 F. (2d) 326. The movements there involved were identical with the movements here, that is, from the refinery into the holds of vessels through private facilities on the property of the person owning the oil. The court sustained the tax because it was levied on a transportation service furnished by pipe-line carriers, for which published rates were charged.

In 1942, Congress passed an Act exempting from the tax "movement * * * within the premises of a refinery, a bulk plant, a terminal, or a gasoline plant" (Sec. 616, Revenue Act of 1942) but this Act was not in effect during the time in question. (56 Stat. 798, 978.)

Plaintiff says that some of the movements in this case were incidental to the refining of the crude petroleum and that all of them were incidental to the transportation of products by water, and that therefore they should not be subjected to the tax. It bases this argument on the provisions of Article 26 of Regulations 42, promulgated under the Revenue Act of 1932. This article reads in part:

> * * * It also includes the transportation by private owner whenever the movement is substantially similar to movements which pipe-line carriers usually undertake and perform, if the movement is not merely local or incidental to another business or a related business engaged in by the person so transporting, such as the producing or refining of oil. Thus, where a refiner maintains a trunk line or a gathering line from a refinery to an oil field or pool, the services which the refiner performs for himself are similar to those which pipe-line carriers would otherwise render. The refiner, therefore, should pay the tax as though he had in fact employed the services of a carrier. If, on the other hand, the movement is from storage tanks to stills which are a part of the same manufacturing unit, or from wells to flow tanks or storage tanks situated in the immediate vicinity, the movement is not such as a pipe-line carrier would normally render and consequently is not subject to the tax imposed under Section 731. * * *

Although this regulation seeks to exempt from the tax a transportation which is incidental to a business engaged in by the owner of the oil, it is seen that the basic test established by it is whether or not the transportation service upon which the tax is levied is such as is customarily performed by a pipe-line carrier. There can be no doubt under the proof that all pipe-line carriers do charge for a loading service, that is, the transportation of the oil from storage tanks to vessels.

Refineries located away from a navigable stream which had no pipe line from the refinery to the vessel and which had to secure the services of a pipe-line carrier having such facilities would have to pay not only for the transportation from the storage tanks to the water, but also for the loading of the oil into the vessels. A loading charge is made in addition to the charge for transporting up to the point of loading into the vessel. If plaintiff were exempted from this charge it would derive an advantage over other refineries not so favorably located.

The transportation at the Cameron Meadows lease was also from storage tanks to vessels. Tariffs on file in the case show that at least one pipe-line company operating in this vicinity makes a charge of 2½ cents per barrel for this service. The tax was assessed on this charge.

Plaintiff also says the charge upon which the tax was assessed was not a fair charge, that a much smaller charge would have yielded a fair return on the investment. This argument is of no avail because the tax was assessed on the charge established by bona fide tariffs. It is only in the absence of tariffs that the Commissioner is authorized to determine what would be a reasonable charge (Sec. 731 (b)). See *National Pipe Line Co.* v. *United States*, 99 C. Cls. 180, 190, et seq.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE MENOMINEE TRIBE OF INDIANS v. THE UNITED STATES

[No. 44298. Decided February 7, 1944]

On the Proofs

Indian claims; loss of interest by use of interest-bearing funds, instead of non-interest-bearing funds, for tribal expenditures.—Where there were in the Treasury several separate funds of the plaintiff tribe's money, five bearing no interest, two bearing 4% and two 5%; and where the Government, by the Secretary of the Interior, has had frequent occasion to make expenditures out of these funds, on behalf of the plaintiff Indians, and for their support and welfare, under various acts of Congress in which different language was used to indicate what funds should be drawn on for the purposes specified in the respective Acts; it is *held* that the evidence shows that if the Secretary of the Interior had, so far as the several funds were sufficient, and so far as the statutes authorizing expenditures permitted, spent the non-interest-bearing funds first and the 4% funds next, before spending any of the 5% funds, a substantially larger amount of interest would have accrued for the benefit of plaintiff tribe, and plaintiff is entitled to recover.

Same; provision of special jurisdictional act not unconstitutional as interfering with judicial function of Court of Claims.—Section 3 of the special jurisdictional act (49 Stat. 1085, amended 52 Stat. 208) which provides that "at the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States" does not render the act unconstitutional as an illegal interference by Congress with the judicial function of the Court of Claims.

Same; special acts; constitutionality.—Laws enacted by Congress are not unconstitutional because they are special, applicable to only one or some persons, rather than of general application, or because they are retrospective and applicable to fact situations which have occurred before their enactment, rather than prospective, in their application.

Same.—A court is exercising judicial power in the true sense when it takes a rule of law laid down by the legislature in advance of the litigation and applies it to a state of facts proved to the court; and the fact that the rule of law is so definite and certain that the court's task is not a very onerous one, does not, in itself, violate the constitutional separation of powers.

Same; special acts relating to a legal or moral obligation of the Government.—Special acts of Congress, even if retrospective in their operation, are constitutional if they confer on private litigants rights against the Government, when such rights are intended by Congress to fulfill a legal or moral obligation of the Government. *Indians of California* v. *United States*, 98 C. Cls. 583, 599, cited; *United States* v. *Klein*, 13 Wall. 128, and *Allen Pope* v. *United States*, 100 C. Cls. 375, distinguished.

Same; the Government as trustee for the Indians.—The provisions of section 3 of the jurisdictional act in the instant case concerning the principles applicable to an "ordinary fiduciary" add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee. *Seminole Nation* v. *United States*, 316 U. S. 286, cited. See also *The Ottawa and Chippewa Indians* v. *United States*, 42 C. Cls. 240.

Same.—Where, instead of investing in the bonds of other obligors the money which it collected for the Indians, as an ordinary trustee would have been required to do, the Government authorized itself by statute to put the money into its own treasury, and in effect borrowed the money from the Indians, with a promise to pay interest on some of the funds; the Government, as a debtor to and quasi-trustee for the Indians, was under a duty to see to it that the property of the Indians, in the form of claims against the Government, were productive of a return to the Indians somewhat comparable to the return which they would have received on trust funds in the hands of an ordinary fiduciary.

Same; "wrongful handling" of tribal funds; loss of interest thereby is recoverable.—Testing the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to "an ordinary fiduciary"; and the question being whether, according to the terms of the jurisdictional act, there was "any maladministration or wrongful handling of any of the funds"; it is *held* that there was "wrongful handling" and the plaintiff tribe is entitled to recover to the extent that interest was lost to the tribe by the action of the Secretary of the Interior in using funds bearing interest when non-interest-bearing funds, or funds bearing a lower rate of interest, might have safely been used for the purpose of meeting authorized expenditures.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson for the plaintiff. *Messrs. Richard E. Dwight, Andrew E. Stewart, John W. Cragun,* and *Dwight, Harris, Koegel & Caskey* were on the brief.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for defendant. *Mr. Walter C. Shoup* was on the brief.

The court made special findings of fact as follows:

1. This is one of several suits brought pursuant to the Act of Congress approved September 3, 1935, c. 839, 49 Stat. 1085, as amended by the Act of Congress approved April 8, 1938, c. 120, 52 Stat. 208, conferring jurisdiction upon this Court to hear, determine, adjudicate, and render final judgment on all legal or equitable claims of whatsoever nature which plaintiff may have against defendant growing out of any treaties, agreements, or laws of Congress or out of any maladministration or wrongful handling of any of the funds, land, timber, or other property belonging to plaintiff tribe or held in trust for it by the United States.

The petition herein was filed December 1, 1938, within the time limit fixed by section 2 of said Act, as amended. By it plaintiff seeks to recover for the sums of money which it lost through the alleged wrongful handling of the funds held in trust for it by the United States, in that the defendant in making expenditures from such funds failed to exhaust the non-interest-bearing funds before drawing upon the interest bearing funds and failed to exhaust the funds bearing interest at 4% per annum before drawing upon the funds bearing interest at 5% per annum.

2. By treaty of September 3, 1836, 7 Stat. 506, as amended (Art. 3), the United States agreed that the sum of $76,000 should be allowed to the plaintiff tribe and invested in some safe stock, the interest on which should also be invested, until such time as, in the judgment of the President, the income of the aggregate sum could be usefully applied to the payment of annuities as provided in the treaty or to some other purposes beneficial to the Indians. Pursuant to this provision, various state and federal bonds were purchased from time to time. The Act of April 1, 1880, c. 41, 21 Stat. 70, authorized the Secretary of the Interior to deposit in the Treasury of the United States any sums received by him, as Secretary of the Interior and as trustee of the various Indian tribes, on account of the redemption of securities be-

longing to the Indian trust funds and all sums received on account of the sales of securities purchased for temporary investment, whenever he was of the opinion that the best interests of the Indians would be promoted by such deposits in lieu of investments; and directed the United States to pay interest on such sums semiannually at the rate stipulated by treaties or prescribed by law. Acting under this authority, the proceeds of the redemption of bonds purchased pursuant to said Treaty of September 3, 1836, amounting to $153,039.38, were deposited on October 8, 1881, in a fund called the "Menominee Fund," which bore interest at 5% per annum. The interest paid on this fund was placed to the credit of a fund in the Treasury entitled "Interest on Menominee Fund," which had been created in the Treasury on July 1, 1837, to receive the income derived from the securities purchased pursuant to the Treaty of September 3, 1836. The defendant did not pay interest on this latter fund.

3. The Act of June 12, 1890, c. 418, 26 Stat. 146, authorized the Secretary of the Interior to cut and sell the timber on plaintiff's Reservation in the manner provided in that Act. Section 3 of the Act provided that one-fifth of the net proceeds of the sales of logs produced under its provisions should be deposited in a non-interest-bearing fund for plaintiff's benefit and the residue of said proceeds should be funded in the United States Treasury, interest on which should be allowed said tribe annually at the rate of 5% per annum, to be paid to the tribe per capita, or expended for their benefit under the direction of the Secretary of the Interior. Pursuant to this authority, and as a result of the timber operations conducted on plaintiff's Reservation, three trust funds were established in defendant's Treasury, and a fourth one resulted from the Act of 1929, mentioned later in this finding. One-fifth of the net proceeds of the sale of logs under the Act of June 12, 1890, were deposited in a fund set up on August 19, 1891, and entitled "Fulfilling Treaties with Menominees, Logs." This fund was noninterest bearing up until July 1, 1929, but after that date interest at the rate of 4% per annum was paid pursuant to the Act of February 12, 1929, 45 Stat. 1164. Such interest has been deposited

in a non-interest-bearing fund in the Treasury entitled "Interest on Fulfilling Treaties with Menominees, Logs." The 5%-interest-bearing fund directed to be established out of the remainder of the net proceeds was set up on August 2, 1893, and entitled "Menominee Log Fund." The interest paid on this fund was deposited in a non-interest-bearing fund set up on October 26, 1892, under the designation "Interest on Menominee Log Fund."

4. The Act of March 28, 1908, c. 111, 35 Stat. 51, authorized the Secretary of the Interior to cut the timber on plaintiff's reservation, under certain restrictions, and to build, equip, and operate sawmills to manufacture such timber into lumber. Section 3 of this Act provided that the net proceeds of the sale of such lumber and other material should be deposited in the Treasury of the United States to the credit of the tribe and that such proceeds should bear interest at the rate of 4% per annum, the interest to be used for the benefit of plaintiff Indians in such manner as the Secretary of the Interior should prescribe. Pursuant to this authority, and as a result of the timber and lumber-manufacturing operations conducted on plaintiff's reservation under said Act, a 4%-interest-bearing fund, entitled the "Menominee 4% Fund," was set up in the Treasury on September 30, 1909, to receive the proceeds from the sale of lumber and other products. The interest paid on this fund was deposited in a non-interest-bearing fund entitled "Interest on Menominee 4% Fund."

5. The Secretary of the Interior made large expenditures annually from the different trust funds set forth in findings 2, 3, and 4 above, except the "Menominee Fund," referred to in finding 2. He did not, however, first exhaust the balances in the non-interest-bearing funds before making expenditures from the interest-bearing funds, when both types of funds were equally available for such expenditures, nor did he, when both types of funds were equally available, exhaust 4%-interest-bearing funds before drawing upon one of the 5%-interest-bearing funds for such expenditures. By reason of the expenditure of interest-bearing funds before the expenditure of non-interest-bearing funds and the expenditure of one of the 5%-interest-bearing funds before the expendi-

ture of 4%-interest-bearing funds, the plaintiff has lost a substantial amount of interest upon its interest-bearing funds. Since the amount of interest so lost would have been deposited in non-interest-bearing funds, it has not been available further to reduce payments from the interest-bearing funds.

The court decided that under the terms of the jurisdictional act the plaintiff was entitled to recover that amount by which its trust funds would have been increased through the payment of additional interest had non-interest-bearing funds, when they were equally available, been first used for expenses which were instead charged to interest-bearing funds, and had interest-bearing funds bearing 4% been first used for expenses which were instead charged to funds bearing 5% interest. The court directed the defendant in the next hearing under Rule 39 (a) to make a full and complete accounting of the expenditures, deposits, and balances in the funds in order to show the amount of such loss of interest. The court reserved for further proceedings under Rule 39 (a) the determination of the amount of the recovery, and the amount of the offsets.

MADDEN, *Judge*, delivered the opinion of the court:

This is one of several suits brought by the plaintiff tribe of Indians pursuant to a special jurisdictional act. In this suit the plaintiff seeks to recover interest which, it claims, the Government caused the plaintiff to lose over a period from 1890 to the present time on certain interest-bearing funds belonging to the plaintiff but held in the Treasury of the United States. The stated reason for the loss and the liability therefor is that there were several separate funds of the plaintiff's money in the Treasury, five bearing no interest; two bearing 4%; and two, 5% interest. The plaintiff claims that when there was occasion for the Government to spend money on behalf of the Tribe, the non-interest-bearing funds should have been spent first, the 4% funds next, and the 5% funds last. We have found that this practice was not always followed and that substantially less interest accrued to the Tribe as a result. The question for

decision is whether the Government's failure to follow the practice gives the plaintiff a right to recover in this suit.

The special act confers jurisdiction on this court to hear, determine, adjudicate, and render final judgment on

> * * * all legal or equitable claims of whatsoever nature which the Menominee Tribe of Indians may have against the United States, arising under or growing out of any treaties, agreements, or laws of Congress, or out of any maladministration or wrongful handling of any of the funds, land, timber, or other property or business enterprises belonging to said tribe or held in trust for it by the United States, or otherwise; including, but without limiting the generality of the foregoing, * * * claims for damages resulting from the improper or unlawful expenditures of tribal trust funds, including trust funds created by the Act of April 1, 1880, entitled "An Act to authorize the Secretary of the Interior to deposit certain funds in the United States Treasury in lieu of investment" (21 Stat. L. 70), and the Act of March 22, 1882, entitled "An Act authorizing the sale of certain logs cut by the Indians of the Menominee Reservation in Wisconsin" (22 Stat. L. 30), and the Act of June 12, 1890, entitled "An Act to authorize the sale of timber on certain lands reserved for the use of the Menominee Tribe of Indians, in the State of Wisconsin" (26 Stat. L. 146), and the Act of March 28, 1908, entitled "An Act to authorize the cutting of timber, the manufacture and sale of timber, and the preservation of the forests on the Menominee Indian Reservation in the State of Wisconsin" (35 Stat. L. 51), and the Act of February 12, 1929, entitled "An Act to authorize the payment of interest on certain funds held in trust by the United States and Indian tribes" (45 Stat. L. 1164); * * *

The first interest-bearing fund originated in the Act of 1880, referred to in the jurisdictional act. As shown in finding 2, the United States, in 1836, by treaty provided that $76,000 should be allowed to the plaintiff tribe and invested in some safe stock, the income from which was also to be invested until such time as, in the judgment of the President, the income from the accumulated stock could be usefully applied to the payment of annuities as provided in the treaty, or some other purpose beneficial to the Indians. The money was invested in state and federal bonds. The Act of

1880 authorized the Secretary of the Treasury to deposit the proceeds of the redemption of the bonds in the Treasury, instead of reinvesting the proceeds, and provided that interest should be paid upon these deposits at the rate stipulated by treaties or prescribed by law. In 1881 a deposit of $153,039.38 was made in the Treasury, in a fund called "Menominee Fund," which bore interest at 5% per annum. This fund was never encroached upon, and no complaint is made of its management.

The act of 1890, referred to in the jurisdictional act, and in finding 2, provided for the sale of timber from the plaintiff's reservation and for the deposit in the Treasury of one-fifth of the proceeds in a non-interest-bearing fund and four-fifths in a fund bearing 5% interest. This latter fund became known as the "Menominee Log Fund." The interest, as it accrued, was placed in a non-interest-bearing fund. The two 4% funds and the other non-interest-bearing funds arose out of similar legislation which is outlined in the findings.

The Secretary of the Interior has had frequent occasion to make expenditures on behalf of the Indians, and out of their funds, for the general support and welfare of the tribe, as for health, education, maintenance of the agency, etc.; for per capita payments; and for the expense of the care and sale of timber and lumber. The various acts of Congress authorizing these expenditures used slightly differing language to indicate what moneys could be drawn upon for these expenses. For example, the act of 1890 empowered the Secretary to advance money for the expense of cutting and marketing timber "out of any money in the Treasury belonging to said Indians." The act of 1906 authorized the payment of the expense of cutting and sawing timber to be paid "out of the funds of the said Menominee tribe of Indians now on deposit in the United States Treasury." Looking at all the statutes authorizing expenditures of the plaintiff's money, we find that none of them expressly restrict the expenditures to either non-interest-bearing funds or interest-bearing funds. The statutes enacted between 1890 and 1927 authorizing per capita payments would not have permitted such payments from two of the non-interest-

bearing funds, since they permitted such payments to be made out of, and, apparently, only out of, tribal funds created by the Acts of 1890 and 1908. But there were two other non-interest-bearing funds which were set up under those acts, from which the per capita payments could have been made, so far as those funds were sufficient.

The evidence, largely in the form of accounts furnished by the Comptroller General, shows that if the Secretary of the Interior had, so far as the several funds were sufficient, and so far as the statutes authorizing expenditures permitted, spent the non-interest-bearing funds first and the 4% funds next, before spending any of the 5% funds, a substantially larger amount of interest would have accrued for the plaintiff's benefit.

Section 3 of the jurisdictional act provides that "At the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States * * *." The defendant urges that if this provision of Section 3 is construed as intended to have any substantial effect, it becomes unconstitutional as an illegal interference by Congress with the judicial function of the court.

We think this contention is without merit. Congress is the lawmaking branch of the Government, and laws made by it are not unconstitutional because they are special, applicable to only one or some persons, rather than of general application, or because they are retrospective and applicable to fact situations which have occurred before their enactment, rather than prospective, in their operation. The cases cited by the defendant were cases where the effect of the special, or retroactive, legislation was to deprive a private person of a right which he had acquired under the law which was in effect when the transaction occurred. They contain expressions to the effect that retroactive legislation is not true legislation, since it does not fit the classical definition of a law as "a rule of civil conduct," the conduct having already occurred before the "law" was enacted.[1] We think that the

[1] E. g., *Merrill* v. *Sherburne*, 1 N. H. 199, 203.

true reason for unconstitutionality of legislation, where it has been found in such cases, is in its deprivation of litigants of existing rights, rather than in its asserted attempted exercise by the legislature of judicial power. A court is exercising judicial power in the true sense when it takes a rule of law laid down by the legislature in advance of the litigation and applies it to a state of facts proved to the court. The fact that the rule of law is so definite and certain, as it is likely to be when made for a special situation, that the court's task is not a very onerous one, does not, in itself, violate the constitutional separation of powers.

We have no doubt that special acts of Congress, and even though retrospective in their operation, are constitutional, if they confer rights on private litigants against the Government, which rights are intended by Congress to fulfill a legal or moral obligation of the Government. See *Indians of California* v. *United States*, 98 C. Cls. 583, 599. We have no problem here, such as the Supreme Court of the United States had in the case of *United States* v. *Klein*, 13 Wall. 128, of an attempt by Congress, by the enactment of a statute while litigation was pending, to control the court's decision. This court dealt with a similar problem in the case of *Allen Pope* v. *United States*, No. 45704 (100 C. Cls. 375), where the statute attempted to direct the rehearing, and the decision in a specified manner, of a case in which a final judgment had already been rendered.

We further think that the provision of Section 3 of the jurisdictional act concerning the principles applicable to an "ordinary fiduciary" add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee. In *Seminole Nation* v. *United States*, 316 U. S. 286, Mr. Justice Murphy, speaking for the Supreme Court said

> * * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.

This Court's decision in the case of *The Ottawa and Chippewa Indians* v. *United States*, 42 C. Cls. 240, recognizes

the same principle. We will, therefore, test the conduct of the Government, in its handling of the funds of the plaintiff Indians, by the standards applicable to a trustee. Our question is whether, according to the terms of the jurisdictional act, there was "any maladministration or wrongful handling of any of the funds" of the plaintiffs by the Government.

We think there was "wrongful handling." The Government, instead of investing the money, which it collected for the Indians, in the bonds of other obligors, as an ordinary trustee would have been required to do, authorized itself by statute to put the money into its own treasury, in effect to borrow the money from the Indians, giving them its promise to pay interest on some of the funds. A private trustee who borrowed the trust money for his own use would, by that conduct, be guilty of a breach of trust. But the plaintiff does not assert that conduct as a breach of trust by the Government. However, the Government, as debtor to and quasi trustee for the Indians, was under a duty to see to it that the property of the Indians—that is, their claims against the Government—were productive of a return to them somewhat comparable to the return which they would have received on trust funds.

An arm's-length debtor who owes his creditor one debt which does not carry interest, and another which does, can direct that his payment shall be applied to the latter debt, in the absence of a contrary agreement. He can thus save himself some interest and deprive his creditor of some return on his interest-bearing claim. But a debtor who stands in the position of a trustee or fiduciary toward his creditor, as the Government did here, must manage the transaction from the opposite standpoint. He must so manage the transaction as to keep the creditor's claim productive, and, because he is the debtor, productive at his own expense. His position as "debtor-with-the-duties-of-a-trustee," as the Indians might call it, is an anomalous one, difficult from an ethical standpoint. But the Government voluntarily assumed that position, and by the jurisdictional act has consented to be held to the standards of that position.

We need not decide whether, if former Congresses had required of the Secretary of the Interior a violation of the fiduciary duties which we have defined, the Congress which enacted the jurisdictional act would, by its language, have given us the power to adjudge that those former Congresses had been guilty of a breach of trust. The various acts of Congress authorizing expenditures from funds of the tribe did not repudiate the trust obligation. Under those acts the Secretary of the Interior had the power to comply with the trust obligation, i. e., to spend the non-interest-bearing funds first, to whatever extent they were available and sufficient. It would be fair to suppose that Congress expected him to do that, and thus fulfill the Government's duty as a quasi trustee. But whether Congress expected that, or was not conscious of the problem, the Secretary, acting for the Government, was under a duty to act in harmony with the Government's position as a fiduciary, and he was not prevented from doing so by the statutes under which he acted.

We conclude, therefore, that to whatever extent the Secretary of the Interior could have, in the course of prudent management of the affairs of the Indians, and without impairing funds which he reasonably thought it was necessary to keep supplied for the purpose of meeting authorized expenditures, used the non-interest-bearing funds or those bearing the lower rate of interest, and instead used funds bearing interest, or a higher rate of interest, the Government is under a duty to pay to the plaintiffs the interest thereby lost by them. The amount of the loss will be determined in further proceedings under Rule 39 (a) of this court.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

THE MENOMINEE TRIBE OF INDIANS v. THE UNITED STATES

[No. 44303. Decided February 7, 1944]

On the Proofs

Indian claims; negligence of Government in cutting and logging and disposing of timber blown down on reservation of plaintiff tribe.—Where valuable timber on the reservation of plaintiff tribe, blown down and damaged by cyclone July 1905, was not logged as it might have been, while other standing timber was cut and sold under the authority of the act of June 12, 1890 (26 Stat. 146); and where after the enactment of a bill specifically providing for the cutting and sale of the blown down timber (Act of June 28, 1906; 34 Stat 547), no action was taken by the Interior Department to salvage the timber, which was left to deteriorate; and where, thereafter the timber was cut and sold under contracts with private contractors, approved by the Department; it is *held* that in its management of plaintiff tribe's blown down timber the Government was negligent, and that as a result of that negligence the plaintiff tribe suffered substantial losses, and is entitled to recover under the terms of the special jurisdictional act; the amount of recovery, and of offsets, if any, to be determined under Rule 39 (a).

Same; the Government as trustee for Indians in handling tribal property.—The Government having consented to be sued (49 Stat. 1085; amended 52 Stat. 208), the standard of conduct required of the Government in its handling of Indian tribal affairs is that of trustee. See *Menominee Tribe* v. *United States*, No. 44298, *ante*, p. 10.

Same.—Section 3 of the jurisdictional act (49 Stat. 1058; amended 52 Stat. 208), providing that the "same principles of law as would be applied to an ordinary fiduciary" should be followed in the instant case, adds little to what would have been the Government's obligations had section 3 not been enacted.

Same; constitutionality of jurisdictional act.—In assuming obligations on behalf of the Government, Congress has the power to enact special and even retroactive legislation; See *Menominee Tribe* v. *United States*, No. 44298, *ante*, p. 10) and the special jurisdictional act is constitutional.

Same; Government not released from responsibility for contracts made by delegated authority.—Delegation of authority by the Secretary of the Interior to representatives of the plaintiff tribe to negotiate contracts for cutting timber, on tribal lands, as authorized under the special act (34 Stat. 547), did not release the Government from responsibility for the contracts, where such contracts were approved by the Secretary and their performance was subject to his control.

Same; profit to individuals from disposal of tribal property.—The fact that members of the tribe profited from the transactions in connection with the cutting of timber on tribal lands does not disable the tribe from complaining that it was improper management by the Government to permit these individuals to profit out of the tribe's property. *Seminole Nation* v. *United States*, 316 U. S. 286, cited.

The Reporter's statement of the case:

Mr. Andrew E. Stewart for the plaintiff. *Messrs. Dwight, Harris, Koegel & Caskey, Ernest L. Wilkinson*, and *John W. Cragun* were on the briefs.

Messrs. Benjamin Pollack and *Raymond T. Nagle*, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Walter C. Shoup* was on the brief.

The court made special findings of fact as follows:

1. This is one of several suits brought pursuant to the Act of Congress approved September 3, 1935, c. 839, 49 Stat. 1085, as amended by the Act of Congress approved April 8, 1938, c. 120, 52 Stat. 208, conferring jurisdiction upon this court to hear, determine, adjudicate and render final judgment on all legal or equitable claims of whatsoever nature which plaintiff may have against the defendant growing out of any treaties, agreements or laws of Congress or out of any maladministration or wrongful handling of any of the funds, land, timber, or other property belonging to plaintiff tribe or held in trust for it by the United States.

Section 3 of the Act of Congress, as amended, further provides:

> At the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States notwithstanding lapse of time or statute of limitations.

This petition was filed on December 1, 1938. By it plaintiff seeks to recover judgment for maladministration and wrongful handling of its property by the defendant arising out of the failure of the defendant, in violation of its fiduciary duties as referred to in Section 3 of the jurisdictional act above

quoted, to exercise reasonable care and due diligence in the salvaging of a large amount of timber which blew down on the reservation of plaintiff in the year 1905 as hereinafter more fully stated.

2. Plaintiff possesses and occupies a reservation which consists of about 230,000 acres located in the State of Wisconsin and which was acquired by plaintiff under the terms of the treaty of May 12, 1854 (10 Stat. 1064). In the year 1905, a large portion of this reservation was covered by a stand of commercially valuable timber, which was plaintiff's chief source of income. At that time and for many years prior thereto, the defendant, as the guardian and trustee of all the property of plaintiff, was, through the Secretary of the Interior, actively managing the cutting and selling of timber on the reservation.

3. On July 16, 1905, a windstorm blew down many millions of feet of timber in the western part of plaintiff's reservation. The greater part of this timber consisted of valuable species of hardwood such as elm, basswood, maple and birch and would have been readily salable if it had been promptly cut and placed on the market after the blow-down occurred.

4. The defendant negligently failed to cut and harvest the timber blown down on plaintiff's reservation by the cyclone on July 16, 1905, within a reasonable period of time after the blow-down occurred so as to prevent the timber from going to waste through rot and decay, all of which appears with more particularity in findings 5 to 10.

5. Blown down timber deteriorates and loses its sale value through decay if allowed to remain on the ground, the rate of this deterioration being particularly rapid in the case of hardwood timber of the species blown down in large amounts by the storm of July 16, 1905. Within a short time after the storm occurred, the Commissioner of Indian Affairs was notified by various agents and officers of the defendant who then had immediate charge or supervision of timber operations on plaintiff's reservation that, if the timber in the windfall area was to be salvaged without considerable loss, it was essential that it be cut and sold during 1905, if possible, and, in any event, not later than the following summer of 1906.

6. In the year 1905, timber operations on plaintiff's reservation were governed by the Act of June 12, 1890. (26 Stat. 146.) Under the terms of this Act, the Secretary of the Interior was empowered to authorize the agent of the Menominee Tribe of Indians in Wisconsin to employ the Indians to cut and haul not to exceed 20,000,000 feet of all or any portion of the timber on the reservation yearly and to cause the logs so cut to be scaled, advertised and sold to the highest bidder or bidders for cash. No attempt was made at any time by the Secretary of the Interior to cut and sell the timber damaged by the storm of July 16, 1905, pursuant to the authority conferred upon him by the Act of June 12, 1890, although logging of the blown down timber, to the extent of 20,000,000 feet a year, could have been begun by the Secretary in the year 1905 under the provisions of that Act and, at the rate of cutting permitted thereunder, could have been completed in 1906. Instead, after the blow-down occurred, the Secretary approved contracts made pursuant to the Act of June 12, 1890, for the logging of 17,500,000 feet of timber during the year 1905 and for the logging of another 17,500,000 feet of timber during the year 1906, all of which timber was located on parts of the reservation other than the windfall area and was cut while the timber blown down in 1905 was spoiling and going to waste upon the ground. The timber so logged under the Act of June 12, 1890, was less urgently in need of cutting than that injured by the storm of July 16, 1905. Of the 35,000,000 feet cut, 25,000,000 feet was live standing timber which required no salvaging and 10,000,000 feet was dead and down pine and hemlock, which had been cut and left in the woods as a result of prior logging operations under the Act of June 12, 1890, and which was deteriorating much less rapidly than the hardwood species in the windfall area. Even while the blown down timber was being logged during the winter of 1907–1908, another 7,500,000 feet of dead and down pine and hemlock timber was logged on other parts of the reservation under the Act of June 12, 1890. The continuation of these operations outside of the windfall area prevented many of the most capable Indian loggers from working on the blown down timber.

7. On January 3, 1906, the Secretary of the Interior submitted to Congress, with a recommendation that it be enacted into law, a draft of a bill with respect to the sale of the timber in the 1905 blow-down district. This proposed legislation provided that the blown down timber, together with the standing merchantable timber on the sections containing blown down timber, should be sold on a stumpage basis, under rules and regulations to be prescribed by the Secretary of the Interior, to the highest bidder for cash after due advertisement inviting proposals. The Committee on Indian Affairs of the Senate amended the bill to provide that the Secretary of the Interior be authorized to permit the Business Committee of the Menominee Tribe of Indians to cause only the dead and down timber in the blown down area to be cut into logs and hauled to suitable places for sawing and also to provide that the Secretary of the Interior should make contracts with a sufficient number of portable mill owners to come upon the reservation and saw into lumber the logs so cut at a rate not to exceed $3.50 per thousand feet. The bill as thus amended was passed by both Houses of Congress and became the Act of June 28, 1906 (34 Stat. 547). It was further provided in said act that all the necessary expenses incurred in the cutting and sawing of the timber should be paid out of the funds of plaintiff then on deposit in the United States Treasury. The funds for such purpose were taken largely out of the Menominee Log Fund which had been created from the proceeds of prior operations by the Indians under the Act of June 12, 1890.

8. In submitting to Congress in 1906 its proposed bill relating to the sale of the timber blown down in 1905, the Department of the Interior, through its duly accredited officers, represented that the need for new legislation was urgent because the timber would deteriorate greatly in value with large resultant loss to the Indians if it was logged later than the summer of 1906. Notwithstanding these representations, the Department deliberately refrained from taking any steps to cut the timber within a reasonable period of time following the enactment of the Act of June 28, 1906, because it was opposed to the amendments made by Congress to the

bill as originally submitted by the Secretary of the Interior and preferred to let the timber lie where it had fallen rather than to proceed with the cutting of it in the manner directed by the statute as passed by Congress. On August 17, 1906, the Business Committee of the Menominee Tribe requested the Secretary of the Interior to permit it to make arrangements to commence logging operations as authorized by the Act of June 28, 1906, before the heavy snows came and covered the fallen timber to such an extent as to make it impossible to cut it that year. No heed was given to this plea and the Department of the Interior permitted the year 1906 to pass without doing anything to save the timber in the blow-down area. As a result of this inaction, large amounts of the fallen timber went to waste through deterioration before it was finally logged in the winter of 1907.

9. Early in the year 1907 the Department of the Interior devoted itself to an attempt to have the Act of June 28, 1906, repealed and to that end had the bill originally submitted by it re-introduced before Congress. The bill again failed of adoption.

10. Following this unsuccessful effort to procure the repeal of the Act of June 28, 1906, and the enactment of legislation satisfactory to itself, the Department of the Interior finally decided to comply with the existing statute. Rules and regulations to govern the cutting and sawing of the timber which had been prepared in the fall of 1906, but which the Secretary of the Interior had delayed approving until December 5, 1906, when it was too late in the year to commence operations thereunder, were amended and issued in final form by the Secretary on April 8, 1907. On April 18, 1907, the Secretary of the Interior appointed John W. Goodfellow as superintendent of logging (hereinafter for convenience referred to as the local superintendent of logging) to supervise the cutting of the dead and down timber in the blow-down district in accordance with said rules and regulations. June 18, 1907, Goodfellow notified the Commissioner of Indian Affairs that, pursuant to the rules and regulations, he had selected three mill sites, designated, respectively, as mill sites No. 1, 2 and 3, at which mills should be erected for sawing the dead and

down timber into lumber. The mill sites thus selected by the local superintendent of logging were approved by the Indian Office on July 10, 1907.

11. Between August 28, 1907, and December 7, 1907, thirty-nine contracts were entered into between the Business Committee for the Menominee Tribe and logging contractors for cutting, logging and delivering at the mill sites the dead and down timber in the blow-down district. All of these contracts were made in accordance with an authorized form of contract prepared by the Bureau of Indian Affairs, and were approved by both the local superintendent of logging and the Secretary of the Interior. This approval was expressly required under the terms of the contracts to make them effective and enabled the defendant to exercise control over the making of the contracts.

12. The defendant failed to exercise proper care and supervision over the making of contracts for the cutting, hauling and transporting of the blown down timber on plaintiff's reservation and over the operations which took place under said contracts, all of which appears with more particularity in findings 13 to 22.

13. The defendant, through the local superintendent of logging and the Secretary of the Interior, failed to exercise due care to protect the interests of the plaintiff in the making of the logging contracts in the following respects:

The defendant knowingly permitted the Business Committee of the Menominee Tribe to make contracts with certain of its own members and other favored Indians who were not qualified and equipped to do logging, but who entered into such contracts with a view to securing white men as partners to do the actual work thereunder. In order for a white man to secure a contract it was in many cases required by the Business Committee that he take one or more individual Indian partners who participated in the profits without contributing labor, money, supplies or equipment to the actual work to be done under the contract. Under this practice, the contract price was increased sufficiently to cover the portion of the proceeds paid to the Indian partners for doing nothing. The prices for logging in the blow-down district as fixed in

the contracts and approved by both the local superintendent of logging and the Secretary of the Interior, ranged from $6.75 to $7.00 for each thousand feet of timber cut and delivered, and were in excess of the reasonable prices which should have been paid for such work. With few exceptions, all the work of logging in the blown-down area was done by white men who would have performed the work for considerably less had they not been required to accept Indian partners. A few members of the Tribe, including members of the Business Committee and their relatives and friends, were thus permitted by the defendant, through the approval of the contracts by the local superintendent of logging and the Secretary of the Interior, to procure large gains for themselves at the expense of the plaintiff without rendering any services of value in return therefor.

Although the general superintendent of logging of the Indian Bureau in a report dated November 5, 1907, notified the Commissioner of Indian Affairs of the above-recited facts concerning the making of the contracts, and urged that no more contracts be approved under these conditions, nine logging contracts, of which two were made with the chairman of the Business Committee, were thereafter approved by the Secretary of the Interior without any change in the contract prices or other conditions mentioned in the report.

14. In September, 1907, some two years and two months after the blow-down occurred, logging operations in the blow-down district were finally begun under the supervision of John W. Goodfellow, the local superintendent of logging appointed by the Secretary of the Interior. These operations continued into the following spring during which period a total of 40,539,480 feet of timber were reported as having been cut. It was the duty of Goodfellow to enforce those provisions of the rules and regulations prescribed under the Act of June 28, 1906, and of the logging contracts which were designed to prevent wasteful operations on the part of the contractors and to protect the interests of the plaintiff. He negligently permitted the contractors to perform their contracts in a wasteful manner and to violate the Act of June 28, 1906, the rules and regulations, and the contracts, in many respects,

as hereinafter stated (see findings 15 to 18, inclusive), which negligence resulted in a substantial waste of the funds and property of the plaintiff.

15. Although the Act of June 28, 1906, the rules and regulations prescribed thereunder, and the logging contracts specifically provided that only dead and down timber should be cut in the blow-down district and although each contractor was required by his contract to clear the area assigned to him of all dead and down timber, nevertheless the contractors, throughout the entire period of the logging operations, were negligently allowed by the defendant to cut large quantities of green timber and to leave on the ground millions of feet of the merchantable dead and down timber which was intended to be salvaged under the Act of June 28, 1906, but which instead was permitted to rot and go to waste in the wood. Many of the contractors logged only the most profitable and conveniently located portions of the areas assigned to them under their contracts. There was a failure on the part of the local superintendent of logging to compel the contractors to salvage the full merchantable content of those dead and down trees which were cut by them, with the result that large amounts of plaintiff's timber were wasted. Tops of trees measuring from ten to twelve inches in diameter, and each containing a merchantable log anywhere from four to thirty feet in length, were left in the woods, although the rules and regulations required all merchantable timber in each tree down to six inches in diameter at the small end of the log to be utilized. Many stumps were cut from four to twelve feet from the ground instead of eighteen inches as required by the terms of each contract.

Other violations of the contracts which were negligently permitted by defendant and resulted in a waste of plaintiff's timber, were the careless injuring of live trees in logging operations, the failure to remove lodged trees, the use of certain valuable species of timber for construction purposes in the logging camps, the failure to cut merchantable timber used for skids into logs and the leaving of many good logs in the woods to decay after they had been cut.

16. Each logging contract designated the particular mill site to which the logs cut thereunder should be delivered.

Logs scaled in the amount of 7,075,040 feet were delivered at mill site No. 2 and logs scaled in the amount of 5,816,540 feet were delivered at mill site No. 3. No logs, however, were delivered at mill site No. 1, which was located along the Wolf River at a place known as Norway Dam, or Neopit. Instead the contractors were permitted by the local superintendent of logging to dump the logs required by the contracts to be delivered at mill site No. 1 into and along the beds of the two branches of the Wolf River above mill site No. 1, thereby causing the plaintiff to incur unnecessary additional expense in providing for the transportation of such logs to mill site No. 1 to be sawed into lumber. Logs scaled in the amount of 15,910,540 feet were banked in and along the Little West Branch of the Wolf River and logs scaled in the amount of 11,737,360 feet were banked in and along the Big West Branch. Of these logs, about 12,000,000 feet consisted of hardwood timber which was banked in the streams, despite previous warnings which had been received by the Department of the Interior that no attempt should be made to transport the timber by water since much of the hardwood would sink in the streams.

17. The number of logs placed in and along the two branches of the Wolf River, as stated in finding 16, was far beyond the capacity of those streams to carry, even if all the timber had been floatable. Solid rollways filled the streams from shore to shore and some extended as far back as two hundred feet into the woods. Logs were rolled over the river banks in careless fashion and became tangled in the rollways. The contractors were permitted to congest the streams with tops, stumps, brush and other refuse carelessly thrown into the water. By negligently failing to restrain these practices, the defendant greatly increased the expense to plaintiff of handling and transporting the logs which had been banked in and along the streams.

18. The local superintendent of logging was required by the logging rules and regulations to employ, subject to the approval of the Secretary of the Interior, a sufficient number of scalers to scale all of the logs cut by the contractors and to make rules for the guidance of such scalers, who were subject to his control and supervision. Some of the scalers so em-

ployed were related to the contractors; and in one case the scaler was the partner of the contractor in connection with another logging contract. As a result of careless and improper practices on the part of the scalers and the negligent failure of the defendant, through the local superintendent of logging, to exercise proper supervision over their work, the logs cut by the contractors were overscaled anywhere from 7% to 31%. Hollow logs were scaled as sound; worthless culls were granted from forty per cent to full scale; none of the customary deductions were made for dead and decayed sap wood, crooks, shake, punk, ring rot, heart rot, or other defects; the same log was in many instances scaled at both ends and counted as two logs. Logs were overcounted by the scalers so that contractors received credit for more logs than were cut by them. Frequently, the scalers omitted marking the logs, contrary to all rules of proper scaling, thus preventing verification of their work. By reason of the foregoing practices, all of which should have been prevented by the defendant, through the local superintendent of logging, the contractors received payment from plaintiff's tribal funds greatly in excess of what they had earned under their contracts.

19. Joseph R. Farr, general superintendent of logging of the Indian Bureau, was the superior officer of the local superintendent of logging, John W. Goodfellow, and was under a duty to exercise supervision over the work being performed by the local superintendent. Farr made an examination of the logging operations in the blow-down district early in November, 1907, when the operations had been in progress only about four weeks and less than 2,000,000 feet of timber had been cut. He found, and specifically brought to the attention of the Commissioner of Indian Affairs in a report dated November 5, 1907, the acts of waste and violations of the contracts being committed by the contractors without restraint by the local superintendent of logging in logging the timber in the blow-down district, as stated in findings 14 and 15. He further reported that, although the contracts required delivery of the logs at the mill sites and although the hard-wood timber would sink if placed in water, Goodfellow was permitting the contractors to bank non-floatable logs in and along the

streams as stated in findings 16 and 17, and that it was the intention of Goodfellow to attempt to deliver fifteen or twenty million feet of logs by water to Mill No. 1.

Farr did not again visit the blow-down district until the latter part of February, 1908, near the close of the logging season, at which time he found that there had been not only a continuation but an aggravation of the conditions mentioned in his prior report.

Notwithstanding the fact that the defendant, through the general superintendent of logging and the Commissioner of Indian Affairs, thus had notice almost from the outset as to the manner in which the logging operations in the blow-down district were being conducted and as to the failure of the local superintendent of logging to prevent waste and violations of the contracts, it negligently failed to take any effective steps to put an end to such conditions. Not only was Goodfellow not removed as local superintendent of logging following Farr's report in November, 1907, but no further investigation was made of the manner in which he was performing his duties or of conditions in the blow-down district until the operations there were practically completed.

20. On January 22, 1908, the Secretaries of the Interior and Agriculture entered into a formal cooperative agreement under which the Forest Service of the Department of Agriculture was to take full charge of timber work on all Indian Reservations. On March 10, 1908, the Forest Service sent E. A. Braniff, a forest assistant, to plaintiff's reservation to take charge of all timber operations there. Braniff immediately observed the waste and violations of contracts in the blow-down district and reported them to his superiors. It was not until April 18, 1908, however, that Braniff suspended Goodfellow from office as local logging superintendent. This suspension was approved by the Secretary of the Interior on April 20, 1908, but by that time logging operations in the blow-down area had been completed, including the banking of logs along the two branches of the Wolf River.

21. Following Goodfellow's suspension as local superintendent of logging, the Forest Service caused a careful examination to be made by experienced and competent lumbermen

and scalers of the logging operations in the blow-down district to determine the extent to which the logging regulations and contracts had been violated. It was found that the wrongs and violations of the contracts detailed in findings 15 to 18, inclusive, had been committed by the contractors. On the basis of this examination, Braniff, as the representative of the Forest Service, and Farr, as the representative of the Indian Service, jointly recommended that certain deductions be made from the contract prices to cover these violations in all settlements with the contractors, although it was admitted that the deductions proposed represented compromises and were insufficient to make full restitution for the injuries that had been inflicted. Among other things, no deductions were made for overscaling or for the dead and down trees which the contractors failed to cut as required by their contracts. The settlements so recommended were upheld by the Secretary of the Interior on July 29, 1910, pursuant to a hearing wherein the contractors sought to have the deductions set aside and to recover the full price. Only four contractors accepted the settlements thus offered to them.

22. Pursuant to a special jurisdictional act of April 4, 1910 (36 Stat. 287), the contractors brought suits against the Menominee Tribe of Indians in this Court to recover the balance of the contract prices which were withheld from them as stated in finding 21. These suits were defended by the Attorney General of the United States. The contractors relied on the provision in each of their contracts that when all the logs mentioned in the agreement should have been cut, scaled, reported to the superintendent of logging and accepted by him as a complete fulfillment of the contract, the contractor should be paid as early as practicable after such acceptance the full amount due him under the agreement. Five of the suits were decided February 5, 1917,* and the remainder on February 17, 1919*. In both decisions, the court entered findings of fact and conclusions of law, but no opinion. The court found that Goodfellow accepted the performances under each of the contracts involved and that at the time of such acceptances he was the duly appointed,

*See 52 C. Cls. 521; 54 C. Cls. 208–211.

qualified and acting superintendent of logging and held that the contractors were entitled to the full prices stipulated in the contracts without the deductions made by the Department of Interior. The amounts paid in satisfaction of the judgments entered in favor of the contractors, including interest, totalled $57,223.04, which, together with $1,454.92 paid in settlement of one of the cases, amounted to $58,677.96, all of which was paid out of the funds of the Menominee. Tribe in addition to the sums which had been previously paid to the contractors for their work in the blow-down district.

23. The defendant negligently caused large amounts of the blown down timber to be lost and wasted and spent excessive, extravagant and unnecessary sums of money from trust funds held for and on behalf of plaintiff on operations pertaining to said timber in the following manner:

After the Forest Service took charge of timber operations on the plaintiff's reservation, it was reported by W. E. LaFountain, a lumberman in the Forest Service who had had a great deal of experience in the timber business and who had been placed in charge of driving the timber down the stream, that the two branches of the Wolf River along which the 27,000,000 feet, more or less, of logs had been banked as mentioned in finding 16, were inadequate for driving the timber without expensive improvements, that large amounts of the timber would not float, that driving would be difficult and costly, and that improvements of the stream would be of little future value since much of the timber tributary to the streams consisted either of the non-floating species of hardwood or of basswood, which became discolored and lost from 25% to 50% of its market value, if placed in water, and that a logging railroad should be constructed to transport the logs then banked in and along the streams to mill site No. 1 and to take care of the future supply of timber to the mill. Nevertheless, the defendant, through the Forest Service, negligently caused the sum of over $50,000 to be expended from plaintiff's tribal funds in the construction of dams, sluiceways, and other improvements to permit driving of the logs in the streams, and proceeded to attempt to drive such timber to mill site No. 1. As a result, large amounts

of the logs of the non-floating species were negligently lost through sinking in the streams and mill pond or in being left along the streams. Others, particularly basswood, were damaged through discoloration from water so that their value was considerably impaired. The cost of the driving of the timber down the two branches of the Wolf River, apart from the expenditures for improvements, was excessive, being 90 cents per thousand feet of timber for the Little West Branch and $1.23 per thousand feet of timber for the Big West Branch, all of which was paid out of the tribal funds of the plaintiff.

24. On November 13, 1907, the Secretary of the Interior, under the provisions of the Act of June 28, 1906, called for bids from operators of portable saw mills to saw into lumber the timber being logged in the blow-down district. No bids were received for mill sites Nos. 2 and 3. Two bids were received for mill site No. 1, both of which were finally rejected on December 27, 1907, as not coming within the provisions of the act. To save the timber, Congress enacted the Act of March 28, 1908 (35 Stat. 51), which authorized the Secretary of the Interior to cause sawmills to be built on the reservation and the timber to be manufactured into lumber and sold.

25. The defendant negligently failed to manufacture, sell, or otherwise dispose of the blown down timber within a reasonable period of time after the Act of March 28, 1908, had been passed, and caused further sums of money to be needlessly spent from the trust funds held for and on behalf of the plaintiff, all of which appears with more particularity in findings 26 to 28.

26. It was essential to erect the mills provided for in the Act of March 28, 1908, with the greatest possible speed, since the blown down timber cut during the season of 1907–1908 was rapidly deteriorating where it had been piled in rollways and was certain to depreciate greatly in value unless quickly made into lumber. Adequate small mills such as had been originally planned for the sites at or near which the timber was piled and such as were contemplated by the provisions of the Act of March 28, 1908, could have been constructed and put in operation within three or four months

after adoption of the Act. The Forest Service, which then had charge of timber operations on Indian reservations under the cooperative agreement, was promptly warned by General Superintendent of Logging Farr and others that construction of the mills should be started at once or great loss would ensue.

27. After spending tribal funds of plaintiff in erecting a frame for a sawmill at mill site No. 2 and clearing the mill site No. 3, the Forest Service, although fully aware of the need for haste in manufacturing the timber into lumber, abandoned these sites and improvements and the plan of erecting small mills to saw the timber at the three different sites, and instead began to construct a large central plant at mill site No. 1 at Neopit to saw all the logs that had been cut in the entire blow-down area. There was erected pursuant to this plan a large sawmill with a capacity of sawing over 40,000,000 feet of lumber a year, a planing mill, a warehouse, a spacious office, a model hotel of forty-seven rooms, four large cottages for officers of the mill, fifty cottages for employees, a barn, steam-heating, electric light and water plants, a sewerage system and other installations. The first authorization for construction work on this large plant was not given until May, 1908, and the mill was not completed until January 14, 1909. A contract with the Wisconsin and Northern Railroad Company to build railroad branches to mill sites Nos. 2 and 3 to transport the logs piled there to the Neopit mill was not made until September, 1908, although the railroad company had indicated its willingness to construct such branches as early as 1906. The year 1908 was permitted to pass without sawing into lumber any of the millions of feet of timber piled at mill sites Nos. 2 and 3, or which lay along the streams above mill site No. 1. When the Neopit mill was completed, the timber in the streams was frozen in and inaccessible and did not begin to reach the mill until the spring of 1909. Hauling and driving the timber to the mill was not completed until the latter part of 1909, over four years after the blow-down had occurred.

28. During the long period of time required for constructing the large mill and other buildings at Neopit and transporting logs to that place, millions of feet of the blown down

timber needlessly went to waste through decay while waiting to be sawed into lumber. Moreover, the plan of constructing a single mill at Neopit after large quantities of logs had been piled at mill sites No. 2 and No. 3, entailed the unnecessary expense of rehandling and transporting such logs to Neopit. Much of the blown down timber which finally reached the Neopit mill was so badly deteriorated and was so costly to manufacture into the poor grade of lumber which could be made from it, that it was a waste of the plaintiff's funds to attempt to transport and manufacture such timber into lumber instead of allowing it to remain where it had been piled. As a result of all the facts hereinbefore set forth, the plaintiff sustained substantial losses.

The court decided that the plaintiff tribe was entitled to recover and reserved the determination of the amount of the recovery, and the amount of the offsets, if any, for further proceedings, as provided in Rule 39 (a) of the court.

MADDEN, *Judge*, delivered the opinion of the court:

This is one of several suits brought by the Menominee Tribe of Indians under the special jurisdictional Act of Congress of September 3, 1935, c. 839, 49 Stat. 1085, as amended by the Act of April 8, 1938, c. 120, 52 Stat. 208. The jurisdictional act, in section 1, confers jurisdiction upon this court

> * * * to hear, determine and adjudicate and render final judgment on all legal or equitable claims of whatsoever nature which the Menominee Tribe of Indians may have against the United States arising under or growing out of * * * any maladministration or wrongful handling of any of the funds, land, timber, or other property or business enterprises belonging to said tribe or held in trust for it by the United States, or otherwise; * * *

The act provides in section 3 that at the trial the court shall apply, as respects the United States

> * * * the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States notwithstanding lapse of time or statute of limitations. * * *

This suit is brought to recover damages for alleged maladministration on the part of the Government, as trustee and

guardian of the property of the plaintiff in connection with the salvaging of a large amount of valuable timber on the plaintiff's reservation, which timber was blown down by a cyclone on July 16, 1905. The basis of the plaintiff's claim is that the blown down timber contained many million feet of valuable lumber; that the timber could have been saved and marketed if care had been taken to log it and dispose of it promptly; that the Government had assumed guardianship and control over the plaintiff's property, and held the title to it in trust for the plaintiff; that it was the Government's duty to exercise the care and diligence of a guardian or trustee to protect the property interests of the plaintiff in the timber; that instead of protecting the plaintiff's interests adequately, the Government negligently failed to make arrangements for the logging and saving of the timber; that logging did not even begin until more than two years after the blow-down; that the Government made improvident contracts for the logging which made it unnecessarily expensive; that the contracts as made were not enforced by the Government against the contractors, who failed to log much of the down timber, logged instead a large amount of green timber, failed to deliver many of the logs to the place where they had contracted to deliver them, and overscaled the logs that they did cut; that after the logs were cut, the Government negligently failed to arrange to have them sawed into lumber until many were worthless or greatly depreciated in quality and value, so that the lumber did not bring enough to repay the plaintiff its money which had been laid out in logging and transporting the timber and sawing the lumber. The plaintiff points to the provision of section 3 of the jurisdictional act, quoted above, which provides that the court shall apply, as respects the Government "the same principles of law as would be applied to an ordinary fiduciary", and insists that the conduct of the Government fell well below that standard.

The Government, for its defense, denies that it was negligent in its dealing with the plaintiff's property; places upon the plaintiff itself the blame for losses incurred in connection with the letting and performance of the contracts for the logging of the blown down timber, since the contracts were let by the Business Committee of the tribe, as permitted by

an act of Congress and the consent of the Secretary of the Interior; and urges that as to the provision of the jurisdictional act applying to the Government the standards of conduct required of an ordinary fiduciary, it is unconstitutional as a direction to the court as to how it must decide the case.

As to the standard of conduct which should be applied to the Government, it having consented to be sued, we have said in the companion case of *Menominee Tribe of Indian* v. *The United States*, No. 44298, decided this day, that the Government owes to the Indians the duties of a trustee, in the care and protection of their property, and that the special provision of section 3 of the jurisdictional act, which same act was the basis of our jurisdiction in that case, seemed to add little to what would have been the Government's obligations in the absence of section 3. We also said in that case that Congress had the power in cases such as these, to enact special and even retroactive legislation.

We have concluded, as appears from our findings, that the Government was, in its management of the plaintiff's blown down timber, negligent in several particulars, and that the plaintiff suffered substantial losses as a result of that negligence. The fact that the Government delegated a part of that management to the Business Committee of the tribe does not exonerate the Government from its responsibility. The act of 1906 provided

> That the Secretary of the Interior be, and he is hereby, authorized to permit the Business Committee of the Menominee Tribe of Indians in Wisconsin to cause to be cut into logs and hauled to suitable places for sawing and cause to be scaled, under such rules and regulations as he may prescribe, the dead and down timber * * *

This statute did not amount to an emancipation, *pro tanto*, of the plaintiff tribe. The Secretary of the Interior published regulations concerning the contracts, and required each contract to be submitted for approval. If the contracts were prejudicial to the plaintiff's interests he should not have permitted them to be made. He had supervision over the performance of the contracts, and should not have accepted, as performance, the badly done and unfinished work which he did accept. In *Seminole Nation* v. *United States*, 316 U. S.

286, the Supreme Court rejected a defense similar to the one here under discussion, saying, p. 297,

> Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.

Here, as in the *Seminole case*, the fact that some members of the tribe profited from the transaction does not disable the tribe from complaining that it was improper management by the Government to permit these individuals to so profit, out of the tribe's property.

The plaintiff is entitled to recover. The amount of its damages, and of offsets, if any, may be determined in further proceedings under Rule 39 (a) of this court.

It is so ordered.

Whitaker, *Judge;* and Littleton, *Judge*, concur.

Jones, *Judge;* and Whaley, *Chief Justice*, took no part in the decision of this case.

THE L. E. MYERS CO., A CORPORATION, v. THE UNITED STATES

[No. 45056. Decided February 7, 1944]

On the Proofs

Government contract; decision of contracting officer final; jurisdiction.—Where the contract provided in Article 15 that the decisions of the contracting officer were final, subject to appeal to the department head; and where upon such appeal the contracting officer's decisions were approved by the department head; and where there is no evidence indicating that the decisions of the contracting officer and the department head were arbitrary or were not supported by substantial evidence; it is *held* that the court is without jurisdiction to review such decisions.

Same; decisions favorable to plaintiff.—In the instant case the decisions of the contracting officer and department head were as favorable to the plaintiff as the evidence would have warranted.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Delaware corporation with its principal office and place of business in Chicago, Illinois.

2. July 10, 1935, plaintiff executed a contract with the defendant whereby plaintiff agreed to furnish all labor and materials and perform all work required for constructing a transmission line and removing and disposing of an existing line of the Ohio Power Company at the Dover Reservoir near Bolivar, Ohio. The consideration was based upon estimated quantities for designated units at unit prices on the basis of which an estimated consideration was shown of $54,374.92. Plaintiff was required to commence the work within five calendar days after date of receipt of notice to proceed and to complete the work within ninety days thereafter. The contract was signed on behalf of the defendant by J. D. Arthur, Jr., Major, Corps of Engineers, as contracting officer. By its terms the contract was subject to the written approval of the division engineer at Cincinnati, Ohio, and was not binding until so approved. August 7, 1935, R. G. Powell, Lieutenant Colonel, Corps of Engineers, division engineer, approved the contract. The contract, drawings, and specifications (plaintiff's Exhibit 1) are made a part hereof by reference.

3. September 4, 1935, the defendant's district engineer forwarded to plaintiff a notice to proceed with the work and that notice was received by plaintiff September 5, 1935. Plaintiff's clerk arrived on the site of the work September 25, 1935, and its superintendent on September 30, 1935. The physical work under the contract was begun by plaintiff on October 2, 1935, and the work was completed January 7, 1936, which was within the contract time as extended.

In general the work called for by the contract was made necessary by reason of the fact that a power line of the Ohio Power Company was in the area of the Dover Reservoir which had been created through the construction of a dam by the

defendant. Under this contract the defendant had a new power line constructed for a distance of approximately four and one-half to five miles and after it was completed and tied into the old line the portion of the old line which it replaced was removed. The new line was constructed almost entirely on private property. Twenty-three towers were constructed which were numbered consecutively from the beginning of the line. Plaintiff began its work at tower No. 1 and in general worked toward the other end of the line, proceeding with the towers in order wherever possible.

Nine separate items were originally involved in this suit. One was abandoned by plaintiff at the oral argument, and no findings will be made concerning it. For convenience each of the eight remaining items will be dealt with as a separate item.

Claim No. 1

4. On October 29, 1935, plaintiff began excavating with a clam shell at tower 13. In making this excavation about two feet of coal in place was discovered at the bottom. Because of the chemical reaction of the coal to the galvanized steel footings for the towers the inspector for the Ohio Power Company required that the steel footings be painted. The defendant's inspector accordingly, at 5 p. m. on November 1, verbally ordered plaintiff to stop work on the footings until they were painted. At that time three of the footings had been lowered into the excavation. November 2, defendant issued a written stop order for work on the setting of footings for that tower until the painting was completed and on the same day issued another order for the removal of the three footings which were in the excavation at the time the stop order was issued. As the result of the issuance of these orders, plaintiff removed the three footings from the excavation and moved the equipment being used there to other tower locations where it continued with its work.

November 4, 1935, plaintiff acknowledged receipt of the order of November 2 to stop work but stated that this constituted a change in the plans and specifications since the painting of steel was not contemplated therein and that it would comply with the request provided it was granted an

extension of time and compensated for the extra work as a result of the delay and the changes. The defendant's inspection force painted the footings on November 4, 1935, and on the same day the defendant ordered plaintiff to reassemble the four footings for tower 13 and to replace the three footings which were in the excavation at the time the order to stop work was issued. That letter also advised plaintiff that the stop order was no longer effective and that it could proceed with the setting of the footings. November 5 plaintiff acknowledged receipt of defendant's letter of November 4 and stated that it would reinstall the footings for tower 13 with the understanding that it was to be compensated for all extra expense including delays and that proper extension of time occasioned by the stop order was granted.

Plaintiff began reassembling and setting the anchors for tower 13 on November 6 and completed the work on November 8. It began the backfilling on November 8 and completed it on November 11.

5. December 7, 1935, plaintiff submitted to defendant a claim dated November 14, 1935, for $491.99 on account of the extra work in removing, painting, and replacing the three footings of tower 13 and also a claim for an extension of time of four days for the delay. While the work was in progress a record was kept by the defendant's inspector of what he considered the additional time work by the several individuals engaged in this work. Based upon that record the contracting officer determined that the extra compensation to which plaintiff was entitled on account of this additional work, including labor, use of equipment, insurance, and profit, amounted to $46.09, and on January 20, 1936, the contracting officer forwarded to plaintiff change order No. 2 dated December 20, 1935, showing an allowance in that amount. In the same change order an extension of time of four days was granted on account of the delays in stopping the work until the footings could be painted. Plaintiff refused to accept the change order.

The record does not satisfactorily establish an amount in excess of that recommended for allowance by the contracting officer and the same is true with respect to all the other claims involved in this suit.

Claim No. 2

6. The soil at tower site 12, as disclosed by test borings and set out on defendant's drawings, was shown as silt, fine sand, clay and stone, and at tower site 13 as silt, clay, fine sand and gravel. On October 28 and 29, 1935, plaintiff started excavating with clam shell at towers 12 and 13, respectively, and on October 29 and 30, 1935, encountered rock at the respective towers. As a result drilling and excavating by hand instead of with the clam shell was required. The excavating at tower 12 was completed on October 30 and at tower 13 on October 31 or November 1.

7. November 4, 1935, plaintiff notified the defendant's resident engineer in writing that the condition referred to in the preceding finding which has been encountered in making the excavation at towers 12 and 13 constituted a changed condition and requested an extension of time and additional compensation on account of the work required. November 14, 1935, the contracting officer made the following reply to the foregoing communication from plaintiff:

> Article 1–09 of the specifications states that the character of materials to be encountered in the required excavations for the tower footings is not guaranteed. Article V of the bidding schedule states in part: "Samples of materials from auger hole borings made at the various locations shown on the contract drawings, are on hand at the United States Engineer Laboratory, Zanesville, Ohio, where they should be inspected by prospective bidders. It is expected that bidders will visit the site and acquaint themselves with all available information concerning the nature of the materials to be excavated for foundations or other required excavations." Therefore no claim under Article 4 of the Contract can be allowed.

8. December 7, 1935, plaintiff submitted to the defendant's district engineer its invoice dated November 14, 1935, in which it claimed $497.85 for the extra expense incurred on account of excavating the rock at towers 12 and 13. It also requested two days' extension of time. The contracting officer reconsidered the claim and on January 20, 1936, informed plaintiff in writing that the statements made in its invoice of the extra work performed did not agree with his records and

the information obtained from his representatives and that he had determined that the reasonable cost of performing the extra work, including labor, use of equipment, material, insurance, and allowance for profit amounted to $260.29. With the letter of January 20, 1936, the contracting officer transmitted to plaintiff for its signature and return change order No. 2 in which the sum of $260.29 was allowed as an extra and an extension of two days' time was granted on account of extra work.

The letter of January 20, 1936, referred to in this finding, is the same communication of that date referred to in finding 5 wherein the contracting officer also made his final decision under Article 15 of the contract on Claim No. 1, and the same change order is involved. The letter contained this statement:

> If the Change Order is not satisfactory, your attention is directed to Article No. 15 of the contract, relative to your authority to make a written appeal within thirty (30) days to the head of the Department, or in this case, the Chief of Engineers.

Plaintiff refused to accept the change order.

Claim No. 3

9. Plaintiff began excavating with a clam shell for the foundations at towers 14, 20, and 21 on October 11, 19, and 21, 1935, respectively, and in proceeding with that work encountered material consisting of loose moist gravel and sand which made it unsafe for workmen in these excavations. As a safety measure the defendant's inspectors instructed plaintiff to use sheeting as a means of preventing the caving in of the sides of the excavations, and of eliminating danger to the workmen. Plaintiff complied with those instructions.

10. November 7, 1935, plaintiff notified the defendant's resident engineer that the requirement to use sheeting constituted a change in the contract since the specifications stated that it was optional with the contractor whether sheeting would be used. Plaintiff accordingly requested additional compensation and an extension of time. November 14, 1935, the contracting officer advised plaintiff that the requirement

that the excavations should be made safe for the workmen came within the contract and that accordingly plaintiff's claim for additional compensation and an extension of time could not be allowed. December 7, 1935, plaintiff submitted to the defendant its invoice dated November 14, 1935, on which it claimed $494.56 for the alleged extra expense incurred as a result of the requirement that sheeting be used at towers 14, 20, and 21, and an extension of six days' time. January 20, 1936, the contracting officer advised plaintiff of his decision under Article 15 of the contract that the use of the sheeting did not constitute a change in the specifications and the claim could not therefore be allowed.

Claims Nos. 4 and 7

11. After some of the towers had been erected, plaintiff began stringing conductors between them. Upon an examination by the defendant's inspectors it was found that some bolts were missing in the towers and others were of the wrong size and were loose. The defendant's representative on November 2 and 12, 1935, accordingly ordered plaintiff to stop stringing conductor and ground wire until after the deficiencies had been corrected and the towers checked and approved.

November 4, 1935, plaintiff advised the defendant that while it was complying with the defendant's order of November 2, 1935, referred to above, it considered it a change in the plans and specifications for the reason that the specifications provided that all bolts should be tightened after the wire had been strung and that therefore it should be granted additional compensation and an appropriate extension of time. November 19, 1935, plaintiff made a similar reply to the order of November 12, 1935.

12. January 9, 1936, plaintiff transmitted to the contracting officer its invoices Nos. 4 and 7 dated January 7, 1936, for $470.91 and $488.56, respectively, in which it made claim for the additional work it was required to carry out under the orders referred to in the preceding finding. In addition an extension of seven days' time was requested on each item. January 24, 1936, the contracting officer notified plaintiff of

his final decision under Article 15 of the contract that plaintiff was entitled neither to additional compensation nor additional time under those claims.

Claim No. 5

13. A paragraph in the specifications provided that back-filling should be carried out in the following manner:

> The footings shall be backfilled with the excavated materials. Backfill shall be thoroughly tamped around the channels and structure in 6 inch layers to the surface of the natural ground. The area of the base of the tamping bars shall not exceed 9 square inches. Where broken rock has been excavated from the footing excavations, layers of these fragments to a depth of 20 inches shall be placed and tamped over the grillage channels. Near the surface of the ground, broken rock, if available, shall be tamped around the grillage leg to prevent side play. After filling to the ground level the excess excavated material shall be crowned around each footing as directed by the contracting officer to provide for future settlement. Backfill material shall be free from roots, brush or objectionable material, and no frozen material shall be placed nor shall backfill be placed on frozen surfaces.

Plaintiff began back-filling on October 7, 1935. In back-filling the towers the defendant's inspectors verbally instructed plaintiff that the material be tamped in 6 inch layers around the footings and over the entire excavated area and that the backfill be free from brush, roots, and other material that would decay. Plaintiff protested verbally against being required to tamp the entire area and insisted that it was only required by the contract to tamp the backfill around the steel base of the footings and not in the entire excavated area. However, plaintiff carried out the defendant's instructions. In some instances sufficient material from that removed from the excavation was not available to fill the hole in the manner required by the inspectors. In order to comply with the inspectors' requirements it became necessary for plaintiff to secure additional material.

14. November 4, 1935, plaintiff gave notice to the defendant's resident engineer that it considered the requirements

which were being enforced in the tamping of backfill constituted a change in the contract and that it would expect additional compensation and an extension of time as a result of that requirement. November 14, 1935, the contracting officer advised plaintiff that the requirement which was being followed was within the specifications and accordingly there was no authority in the contract to allow additional compensation. November 26, 1935, plaintiff submitted an invoice in which claim was made for $486.19 on account of the alleged improper backfilling and request was made for an extension of four days as a result of this work. December 24, 1935, the contracting officer denied the claim on the ground that the backfilling operation as performed was within the specifications. Plaintiff protested that decision January 9, 1936, but the contracting officer affirmed his previous decision January 23, 1936.

Claim No. 6

15. The specifications and plans provided the depth for the excavations for the various footings. After the excavation work had been proceeding since the beginning of the job, plaintiff advised the defendant in writing on November 7, 1935, that in checking over the depths of the excavations required for the tower footings it had found instances where the depths required were different from those indicated in the profile and that it was checking all the tower excavations and would expect additional compensation for all additional material removed by this change of plans. November 14, 1935, the contracting officer advised plaintiff that the depth of excavations required was in accordance with the specifications and drawings and that accordingly no additional compensation could be allowed. January 8, 1936, plaintiff transmitted to the defendant its invoice in which it claimed $485.05 as extra compensation for excavating foundations to a greater depth at all of the tower sites and asked for an extension of seven days on that account. Upon investigation of the claim, the contracting officer on February 12, 1936, found that additional depth of excavation had been required for footings at towers 20 and 21 because of a change in design of those towers and

that the reasonable value of this additional work, including material, labor, equipment, insurance, and profit, was $97.84. The contracting officer further found that the depths of the excavations for the footings at the other towers were within the specifications and drawings and denied any claim therefor. The contracting officer granted an extension of two days on account of this item.

Claim No. 8

16. In some instances plaintiff erected towers before the footings were completely backfilled over the grillages and over the tower legs. As a result when plaintiff came to string wires on these towers, the tower legs had a tendency to buckle and sway toward the center of the tower. When the defendant's engineer discovered this condition on November 12, 1935, he issued an order to stop stringing conductor and ground wire between towers 9 and 13 until the condition was corrected. Plaintiff complied with the stop order and took care of the situation by removing some of the back fill and then jacking the tower legs out until they were forced into their proper position. It then completed the backfill in a manner satisfactory to the defendant's engineer.

17. November 19, 1935, plaintiff advised the defendant's engineer that it considered the corrective work referred to in the preceding finding a change in the plans and specifications and that it would accordingly expect additional compensation as provided in Article 3 of the contract. Its contention was that the buckling arose because the enormous weight of the backfilling when wet pushed the tower legs toward the center of the tower. November 26, 1935 plaintiff submitted an invoice claiming $592.22 as extra expense for this item. December 24, 1935, the contracting officer advised plaintiff that the work required came within the specifications and therefore no additional compensation could be allowed. January 9, 1936, plaintiff resubmitted its detailed invoice for the alleged additional work in which it again made claim for extra compensation of $592.22 and requested four days' extension of time. The claim was again denied by the contracting officer

January 23, 1936, on the same ground as set out in his previous communication.

18. January 22, 1936, plaintiff appealed to the Chief of Engineers from the decision of the contracting officer on the various items heretofore referred to as Claims 1 to 8, inclusive, and attached to that appeal invoices showing in detail the amounts claimed, the appeal being filed with the district engineer (who was likewise the contracting officer) for transmittal to the Chief of Engineers. All of these invoices had been previously considered by the contracting officer.

The contracting officer transmitted plaintiff's appeal to the Chief of Engineers and also certain subsequent communications from plaintiff in regard to that appeal. In transmitting the appeal the contracting officer set out in detail the reasons for his action. The appeal was transmitted through the division engineer who concurred in the recommendations of the contracting officer. Upon consideration of the appeal, the Chief of Engineers on July 23, 1936, sustained the action of the contracting officer on all items, indicating that such action was taken pursuant to Article 15 of the contract. The Chief of Engineers notified plaintiff of his findings and decision denying all of the items of the claim in a letter of the same date. No further appeal was taken by plaintiff. Up to the time of the decision by the Chief of Engineers on plaintiff's appeal, plaintiff had declined to sign two change orders which had been prepared. Subsequent to the decision by the Chief of Engineers the various amounts which were allowed by the contracting officer on Claims 1, 2, and 6 were incorporated in a change order dated August 5, 1936, as well as the total extensions of time amounting to 36 days. That change order and the voucher covering final payment of the balance due under the contract of $4,753.32, including the additional allowances recommended by the contracting officer, were forwarded to plaintiff September 12, 1936, at which time plaintiff was advised that payment would be made upon receipt of the voucher and change order properly signed. Plaintiff signed the voucher and change order without any exceptions and returned them to the defendant September 21, 1936, by a

letter of transmittal in which it was stated that "while we do not feel that this is a satisfactory settlement, our working capital is tied up in numerous contracts and it is necessary for us to obtain these funds." The balance shown due on the voucher was paid plaintiff on September 25, 1936.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff on July 10, 1935, entered into a contract with the Government by which it agreed to construct an electric power transmission line, and remove an existing line, at the Dover Reservoir in Ohio. The work included the setting of twenty-three new towers. It was completed within the time set by the contract, as extended by the Government.

The plaintiff sues because, it claims, the Government's agents, during the course of the work, required the plaintiff to perform extra work and furnish extra materials, not covered by the contract or included in the contract price. The plaintiff presented evidence relating to nine separate items of claim but at the oral argument it abandoned one of those items and we have made no findings of fact concerning that item. As to the items of claim designated as numbers 1, 2, and 6 in our findings of fact, the Government's agents conceded, while the claims were still pending in the Department, that some extra work or materials were ordered, and allowed the plaintiff some extra compensation, very much less than the plaintiff claimed, which extra compensation was paid. As to the other items of claim which we have numbered 3, 4, 5, 7, and 8, the Government's agents took the position that the work done at their insistence was called for by the contract, and that no extra compensation was due. All of the differences between the parties related to questions of fact as to the value of the extra work or material, or questions of the proper interpretation of the contract, to determine whether the work or material furnished was within the requirements of the contract.

The contract, which is incorporated by reference in our findings, contains, the conventional versions of Article 3, re-

lating to Changes, Article 4, Changed Conditions, Article 5, Extras, and Article 15, Disputes. Article 15 contains the following language:

> Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 1–36 of the specifications contained the following language:

> *Interpretation of Specifications.* On all questions relating to the acceptability of material or machinery, classification of materials, the proper execution of the work, and the interpretation of the specifications, the decision of the contracting officer shall be final, subject to appeal as provided for in Article 15, P.W.A. Form No. 51.

The contracting officer made his decisions as to the plaintiff's claims. The plaintiff appealed to the Chief of Engineers, who apparently was, and certainly was regarded by the plaintiff as being, the duly authorized agent of the head of the department to decide the appeals. That official sustained the contracting officer's rulings. There is no evidence indicating that the decisions of the Chief of Engineers and the contracting officer were arbitrary, or were not supported by substantial evidence. They were, therefore, final and are not reviewable here. We have also found, as a fact, that the decisions of these officials were as favorable to the plaintiff as the evidence would have warranted.

The plaintiff's petition will be dismissed.

It is so ordered.

Whitaker, *Judge;* and Littleton, *Judge*, concur.

Jones, *Judge;* and Whaley, *Chief Justice*, took no part in the decision of this case.

SILBERBLATT & LASKER, INC., A CORPORATION, v. THE UNITED STATES

[No. 45302. Decided February 7, 1944]

On the Proofs

Government contract; change made by defendant not a breach of contract.—Under a contract for the construction of a post office building where the Government changed the stone to be used, it is *held* that the change made was within the general scope of the contract, which was not breached thereby, and plaintiff is not entitled to recover. Cf. *General Contracting and Construction Co.* v. *United States*, 84 C. Cls. 570.

Same; equitable adjustment a question of fact.—What constitutes an equitable adjustment is a question of fact. *United States* v. *Callahan-Walker Construction Co.*, 317 U. S. 56.

Same; decision of contracting officer, approved by head of department, final where not arbitrary, capricious or grossly erroneous.—In the instant case, the dispute as to what was an equitable adjustment on account of a change was a dispute arising under the contract, which the contracting officer was authorized to decide under Article 15 of the contract, and his decision as amended and approved by the head of the department was final and conclusive, where not arbitrary, capricious or grossly erroneous.

Same; concurrence in decision of head of department on appeal by third party did not cause decision not to be his independent judgment.—Where the decision, on appeal, by the Under Secretary of the Treasury, as head of the department, was submitted for review to the Administrator of the Federal Works Agency, who concurred in the decision of the Under Secretary; and where the proof shows that the decision of the Under Secretary was rendered without prior conference with the Administrator and was uninfluenced by the views of the Administrator; it is *held* that the decision of the Under Secretary was his own independent judgment and plaintiff under the provisions of the contract is bound thereby.

Same; damages for delay not recoverable unless delay was unreasonable.—Damages for delay in making a change in contract cannot be recovered unless it is shown that such delay was unreasonable. *Magoba Construction Company* v. *United States*, 99 C. Cls. 662; *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61, cited.

Same; decision of head of department as to liquidated damages final where not arbitrary, capricious nor grossly erroneous.—Under the provisions of the contract in the instant case, plaintiff is

bound by the decision of the head of the department in assessing liquidated damages where there is no showing of any arbitrary, capricious or grossly erroneous action.

Same; decision of contracting officer final as to samples of stone submitted.—Under the provisions of the contract and the specifications, the decision of the contracting officer as to whether or not samples of stone submitted by the contractor complied with the specifications was final and binding and plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Max E. Greenberg for the plaintiff.

Mr. D. B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation of the State of New York.

2. On January 26, 1937, the plaintiff entered into a contract with the defendant, represented by C. J. Peoples, Director of Procurement, Treasury Department, as contracting officer, whereby the plaintiff undertook, for the consideration of $330,000, to furnish the materials and perform the work for the construction of a post office building at Poughkeepsie, New York, in accordance with specifications, schedules, and drawings, made a part of the contract by specific designation, the work to be commenced as soon as practicable after the date of receipt of notice to proceed, and to be completed within 360 calendar days after date of such receipt.

The contract contained the usual clauses of the standard form of Government construction contract respecting changes and extras. Articles 3 and 5 pertaining thereto are as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated

increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

* * * * *

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

The contract gave the Government the right to assess liquidated damages for delay in completion of the work at the rate of $70 per day, with the following proviso:

Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon

shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 15 of the contract provided:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16 of the contract provided that partial payments to the contractor would be made at the end of each calendar month, or as soon thereafter as practicable, as the work progressed, on estimates made and approved by the contracting officer; that in preparing estimates the material delivered on the site and preparatory work done might be taken into consideration; and that in making partial payments there would be retained 10% on the estimated amount until 50% of the work had been completed, when the contracting officer might discontinue the ten percent retention, if he found progress satisfactory.

The contract defined the term "head of the department" as the head or any assistant head of the executive department or independent establishment involved; the term "his duly authorized representative" as any person authorized to act for him; and the term "contracting officer" as including the contracting officer's duly appointed successor or his authorized representative.

The specifications provided that the Assistant Director of Procurement, Public Buildings Branch, was the duly authorized representative of the contracting officer.

Administration of the contract was under the Public Buildings Branch, Procurement Division, Treasury Department.

3. On February 19, 1937, the plaintiff received notice to proceed with construction. This fixed February 14, 1938, as the final date for completion.

Work was started March 1, 1937. It was substantially completed and accepted November 26, 1938, an elapsed period of 645 days from February 19, 1937, or 285 days in excess of the contract period of 360 days.

4. In due course the plaintiff received the following letter from the Superintendent of Project Management, Procurement Division, Public Buildings Branch, Treasury Department (which will hereinafter be referred to simply as the Procurement Division), dated February 26, 1937:

> Reference is made to your contract for construction of the Poughkeepsie, New York, Post Office.
>
> Two changes in your contract are desired, and you are requested to forward, through the Construction Engineer's office, your proposal therefor.
>
> (1) Omit bluestone belt course at second floor line on all sides of the building.
>
> The belt course is to be omitted and to be replaced by rubble stone, except where title occurs, at which place a granite panel of the same height as the present belt course and long enough for the title is to be installed.
>
> (2) Omit all remaining bluestone above the first floor line and substitute in place thereof granite similar to the wall facing.
>
> This applies to all quoins, lintels, arches, keystones, sills, copings, etc.
>
> It is desired that the stone facing be laid similar to the Memorial Library at Hyde Park, and stone work of similar character should be laid up in the sample panels required under your contract.
>
> It is contemplated to install a bell under competition in the cupola of the building. Drawings will be prepared showing changes in the floor construction and size and location of the scuttle, and you will be requested to submit proposal for these changes at a later date.
>
> By direction of the Supervising Engineer.

The building was originally designed to be faced with bluestone below the level of the first floor and with split-face granite above the level of the first floor, with a belt course,

quoins, window sills, lintels, and arches of bluestone. The bluestone below the first floor level was to be set against the concrete foundation walls, and the split-face granite above the first floor level was to be backed up with rubble field stone. The interior faces of the exterior walls above the first floor level were to be furred with hollow title.

5. Following receipt of the letter quoted in finding 4, plaintiff on March 5, 1937, requested a conference relative to the contemplated changes. Such a conference was held on March 12, 1937, between plaintiff's representative and the Supervising Architect of the Procurement Division at Washington. At this conference plaintiff was notified that certain changes were in contemplation and it was requested to prepare a sample wall panel similar to the Memorial Library at Hyde Park, using local rubble or field stone. Paragraph 13-4 (B) of the specifications provided in part:

> Sample wall 10 feet by 10 feet shall be laid up in a location selected by the architect, showing variations in color, bonding and jointing, for approval. If not satisfactory, a second sample wall is to be erected. If approved, it is to remain for reference in the construction of the main walls of the building.

On the return of plaintiff's representative to his home, plaintiff on March 16, 1937, wrote the Procurement Division stating that the probability of the making of changes would prevent it from placing orders and expediting the work, and it urged prompt transmittal of the amended drawings, and requested appropriate extension of the contract time for completion. In reply plaintiff was notified on March 25, 1937, that no action on its request for an extension of time would be taken until after the extent of the delay was known.

6. On April 9, 1937, the Procurement Division's Construction Engineer at the site insisted that plaintiff take immediate action on construction of the sample stone panel, first requested by the Supervising Architect March 12, 1937, and promised that the drawing for stone changes would be forwarded as soon as practicable.

The sample stone panel was erected, and on April 21, 1937,

was inspected by the Procurement Division's Supervising Architect, the Designing Architect, the division's Construction Engineer, and by plaintiff's president. The Supervising Architect from time to time ordered other panels to be erected, both in accordance with the contract plans and specifications, and at variance therewith. The Supervising Architect was endeavoring to put into physical form more than one type of wall for the purpose of comparison and selection. The President of the United States was personally interested in the new Post Office Building at Poughkeepsie, and a wall made of local field stone, stone that farmers cleared from their fields and used for fences, was being considered.

7. In the meantime, on May 7, 1937, the plaintiff protested to the Procurement Division over delay occasioned by uncertainty as to the relative quantities of granite and bluestone desired to be used on the project by the Government, complained of a rise in market on bluestone over their original quotations, and suggested that additional cost occasioned by the delay should be borne by the Government.

On May 11, 1937, the Supervising Engineer of the Procurement Division by letter withdrew the request of February 26, 1937, for a proposal (see Finding No. 4), called attention to neglect to erect a sample stone panel, and disavowed responsibility for further delays.

The next day, May 12, 1937, the plaintiff acknowledged receipt of this communication, noted the uncertainty with respect to relative use of granite and bluestone, explained the delay in erecting the sample stone panel as due to the fact that certain bluestone quoins requested by the Supervising Architect had not arrived until May 8, 1937, and requested extension of contract time for completion.

The request of May 12, 1937, for extension of time, was denied by the Supervising Engineer May 14, 1937, for lack of proof, and on the same day the Construction Engineer of the Procurement Division demanded of plaintiff greater expedition in its work.

8. After several wall panels had been built both by the plaintiff and by the defendant under an independent con-

tractor, one was finally approved and adopted on August 8, 1937. The character of wall panels adopted and approved differed materially from that specified in the contract, in that rubble stone was specified instead of bluestone and split-face granite.

9. While the character of the walls to be built was being determined, the plaintiff submitted several samples of bluestone to be used. It first submitted a sample on March 11, 1937, obtained from the Ohio quarry of the Vickery Stone Company. This sample was rejected on March 12, 1937, as not conforming to the specifications.

Plaintiff protested against this and complained that paragraph 13–4 (c) of the specifications limited the selection to the product of one company, the American Bluestone Company, and requested the names of other possible quarries. Paragraph 13–4 (c) of the specifications reads as follows:

> *Bluestone.*—To have the characteristics of "North River" Bluestone. To be nearly uniform in color with slight variations in shade from dark grey blue through blue to purplish dark blue. To be of fine grain and even texture, containing about 78 per cent silica. Exposed surfaces to be horizontally and vertically tooled, to agree with the detail drawings, using four grooves to the inch. Samples to be submitted showing texture.
>
> Joints to be ¼ inch. Mortar to contain very slight addition of yellow ochre powder.
>
> All bluestone to be thoroughly seasoned, and to be cut to sizes shown and so as to set on its natural bed.

"North River" Bluestone is not an individual trade name used by a particular quarry, but is a term used to designate the character of bluestone quarried along the North (or Hudson) River. It is furnished by a number of different quarries in this vicinity.

On May 5, 1937, plaintiff submitted a sample of bluestone secured from the Wyoming Cut Stone Company, Scranton, Pennsylvania, which had been quarried at Portageville, New York. This sample was rejected on May 12, 1937, for the following reasons:

> You are advised that these two samples are very uniform in color and do not comply with the requirements

> of Paragraph 13-4 (c) of the specifications; consequently, before any further action can be taken, it will be necessary that additional samples, showing a range of color and tooled as required, be submitted for consideration.

On May 18, 1937, plaintiff submitted additional samples obtained from the Wyoming Cut Stone Company, but these also were rejected for the following reasons:

> You are advised that these samples are apparently the same stone as submitted by your letter of May 5 and show no more range of color than the original samples.
>
> The above stone is therefore not in compliance with the requirements of Paragraphs 13-4 (c) of the specifications and is rejected.

On June 7, 1937, plaintiff, under protest, submitted further samples. On June 16, 1937, the Supervising Engineer advised plaintiff by letter.

> Consideration is now being given to certain changes in the extent that bluestone will be used at this building. The decision, however, is dependent in a large measure upon the viewing of a new sample panel to be erected on the site as you have been previously advised.
>
> However, as you state this material can be obtained, and as you have submitted certain bluestone samples for approval, no change in the contract requirements for this material is desired at this time.

These samples were approved on June 17, 1937, and plaintiff entered into a subcontract with the Wyoming Cut Stone Company to furnish all bluestone required by the specifications in "Section 13, Stone Work," for the sum of $32,300, any additions to or deductions from the amount of bluestone indicated in the plans and specifications to be at the unit price of $5.47 per cubic foot.

10. Excavation was begun by plaintiff April 5, 1937. The construction of the foundations had sufficiently advanced by July 5, 1937, to enable plaintiff to begin setting bluestone. According to plaintiff's progress schedule the foundations should have been ready for the setting of bluestone by June 7, 1937.

On July 2, 1937, shop drawings Nos. 1 and 3 of the Wyom-

ing Cut Stone Company, indicating the base coarse and steps and floor, were approved for jointing, but the shop drawings showing sills, lintels, and arches were not approved, and on July 15, 1937, were returned to plaintiff without approval, pending final decision "on the kind and treatment of stone work above the water table."

11. On August 12, 1937, defendant requested plaintiff to postpone the installation of the bluestone base below the first floor level because of contemplated changes in the design of the joints, and, accordingly, on that date plaintiff ordered its subcontractor, Wyoming Cut Stone Company, to stop manufacture and shipment of bluestone until further notice, and requested of the defendant an appropriate extension of time for completion of its contract.

12. On August 16, 1937, the Construction Engineer at Poughkeepsie invited a proposal from the plaintiff for the changes which were later, on August 19, 1937, incorporated in the following order issued to plaintiff by the Director of Procurement, contracting officer:

> Reference is made to your contract for the construction of the Poughkeepsie, N. Y., new Post Office Building, relative to telephone instructions of a representative of this Division to stop further manufacture and shipment of bluestone for this building.
>
> These instructions were amplified and confirmed in Division letter of August 16, 1937.
>
> The above mentioned stop order is rescinded and you are ordered to proceed.
>
> Under the provisions of Article No. 3 of your contract, the following changes to the drawings and specifications are made:
>
> (1) All exposed vertical surfaces of bluestone below the first floor line including base course, risers of steps, and sides and tops of cheek blocks and terrace coping shall have shot finish in full accordance with approved sample furnished by the Wyoming Cut Stone Company.
>
> (2) All bluestone treads of steps and the upper platform shall have planer finish.
>
> (3) The bluestone base course shall have false and regular jointing with cutting and rearrangement of stone as indicated on revised and approved shop drawings therefor.

> (4) The cornerstone shall be provided with a coarse sand rubbed finish and the incised lettering kept filled and protected with plaster of paris until the completion of the finish.
>
> (5) No change in the requirements of the drawings and specifications for the pointing for this stone work is desired at this time.
>
> To permit an equitable adjustment in the amount due under your contract and in the time required for its performance to be made, you are requested to assert your claim for such adjustment within the 10-day period stated in the above mentioned Article No. 3.
>
> As it is considered that the changes outlined herein are within the general scope of the contract drawings and specifications, you are directed to proceed with the prosecution of the work so changed without further delay.
>
> A copy of this letter has been forwarded to the District Engineer and the Construction Engineer.

13. On August 20, 1937, the plaintiff notified the contracting officer that the Wyoming Cut Stone Co. was complaining of damages, and that if called upon to pay therefor the plaintiff would expect to be reimbursed by the Government.

On that day, August 20, 1937, the contracting officer served upon plaintiff the following order covering certain additional changes, hereinafter referred to as the "B" changes:

> With reference to your contract for the construction of the Poughkeepsie, N. Y., new Post Office Building, and under the provisions of Article No. 3 thereof, certain changes have been made in the drawings and specifications.
>
> These changes are indicated on revised "B" drawings Nos. 100–B, 101–B, 102–B, 201–B, and 202–B, and described in memorandum specification dated August 20, 1937.
>
> To permit an equitable adjustment in the amount due under your contract and in the time required for its performance to be made, you are requested to assert your claim for such adjustment within the ten-day period stated in the above-mentioned Article No. 3.
>
> As it is considered that the changes hereinbefore mentioned are within the general scope of the original contract drawings and specifications, you have been provided with six sets of these "B" drawings and memorandum specification, and are ordered to proceed with

> these changes, including all work incident thereto without delay.
>
> Any previous approval of materials, samples, or shop drawings not in conformity with these changes is hereby rescinded.
>
> A copy of this letter has been forwarded to the District Engineer and the Construction Engineer.

The walls originally specified were to have a facing of split-faced granite, which was to come from the quarry substantially shaped for setting. The trim was to be of cut bluestone, with quoins at the corners. The walls were to be backed with hollow tile to care for dampness and drainage.

The "B" drawings substituted walls of field stone, stone taken from the fields in the vicinity and shaped at the site. The quoins were omitted, as also the hollow tile. The field stone was parged on the inside with cement and then damp-proofed with mastic paint. Against this damp-proofing was fastened metal furring, which was used as a base for plastering. This new type of wall required some adjustments around the windows.

14. In respect to changes the plaintiff was notified by the Assistant Director of Procurement August 21, 1937:

> In this connection monthly payments may not include partial payments for any new construction in place until an equitable adjustment has been determined therefor.

The plaintiff protested against lack of monthly payments on changes of the magnitude covered by the B drawings, and on September 14, 1937, addressed the Procurement Division by letter as follows:

> Referring to your letter of August 21st with regard to the "B" drawing change order, we beg to call your attention to the fact that we cannot accept the conditions set forth therein to the effect that we are to proceed with the new construction but may not receive monthly payments thereon until an equitable adjustment has been determined.
>
> Our computations indicate an increased cost of approximately $100,000. It was never contemplated and we are not in a position to invest such additional sum without procuring intermediate payments, as we are entitled to under the provisions of Article 16 of our contract.

Although we are anxious to cooperate with you in making the desired changes effective, the modification involved is so substantial when compared to the contract price as to amount to more than a mere variation.

As we see it, there is in effect an abandonment by the Government of the original contract and a substitution of a new one therefor.

In view of this breach of the original contract we feel we are not obligated to involve ourselves in a contract entailing so great an increased cost, particularly under the terms stipulated in your letter.

While we are entitled to an equitable adjustment to be made within a reasonable time and are required to proceed with reasonable variations, the contract does not state that we are not meanwhile to be paid therefor, but to the contrary, Article 16 requires the Government to make monthly payments based upon the progress of the work, the cost of which may be easily ascertained as the work goes on.

15. A proposal was made by the plaintiff August 25, 1937, offering to make the changes set forth in the orders of August 19, 1937, and of August 20, 1937, for the sum of $86,568.97, with an extension in time for completion of the contract of six months.

Before this proposal was acted upon the plaintiff submitted to the Procurement Division a revised and substitute proposal September 8, 1937, in detail as follows:

REVISED PROPOSAL NO. 11

We are proceeding with and propose to furnish all labor and material for additional work in accordance with your order of August 20th and your revised drawings Nos. 100–B, 101–B, 102–B, 201–B, and 202–B, and in accordance with your Memorandum Specifications dated August 20th, 1937,

FOR THE SUM OF NINETY-TWO THOUSAND NINE HUNDRED FIFTY-NINE DOLLARS AND TWENTY-SIX CENTS ($92,959.26)

as enumerated below.

No provision has been made for temporary heat required because of this change and we shall request payment for such temporary heat at a later date.

	Additions	Deductions
Dampproofing and waterproofing	$1, 120. 08	
Field stone in lieu of split granite	99, 810. 00	$19, 165. 00
Parging	1, 280. 00	
Furnishing and installing furring shields	617. 10	
Cut bluestone omitted		6, 125. 00
Cut bluestone setting omitted		1, 960. 00
Bluestone flag in lieu of cement paving	2, 619. 65	143. 00
Brickwork omitted		1, 070. 00
Change in finishing of bluestone sills and copings	350. 00	
Pipe space mezzanine floor	12. 42	
Foundation change	710. 35	
Remove mouldings and install larger mouldings for hollow metal windows due to increase in masonry openings	441. 10	
Sheet metal work	1, 518. 22	
Metal furring in lieu of hollow tile	3, 751. 00	1, 540. 00
Remove mouldings and install larger mouldings for wood windows due to increase in masonry openings	605. 00	
Metal fins	1, 253. 56	
Total additions	114, 088. 48	30, 003. 00
Total deductions	30, 003. 00	
Total	84, 085. 48	
Additional overhead six months	7, 500. 00	
Total	91, 585. 48	
Bond 1½%	1, 373. 78	
Total	92, 959. 26	

In connection with this proposal we request an extension of time of six (6) months in our completion date.

16. On September 14, 1937, the Director of Procurement, the contracting officer, communicated the following decision to the plaintiff, reducing the contract price by $12,820.00:

Reference is made to your contract for the construction of the new Post Office, Poughkeepsie, New York, and to Division letter of August 20, 1937, ordering you to proceed with certain changes and requiring that you assert your claim for adjustment within a period of ten days (10).

The above mentioned changes are set forth in Memorandum specification dated August 20, 1937, and indicated on drawings Nos. 100–B, 101–B, 102–B, 201–B, and 202–B.

On August 25, 1937, you submitted your proposal for these changes in accordance with the above-named specification and drawings, in amount $86,568.97 as an addition to your said contract. A conference was held with you and it appears that the proposal is excessive, the office estimate indicating a credit due the Government. The conference did not result in the submission of a

satisfactory proposal by you. After a further very careful study and based upon all additional information obtained, the office estimate for the changes, excluding temporary heat, is a credit of $12,820.00.

On September 8, you submitted a revised proposal in additional amount $92,959.26 in lieu of $86,568.97 for the above named changes including certain additional items omitted in your original proposal but still excluding temporary heat.

A proposal has not been submitted by you for this work that is considered reasonable in amount. Therefore, in accordance with Article Three of your contract, twelve thousand eight hundred twenty dollars ($12,820.00) is deducted from your contract price for the changes in question, this deduction being considered an equitable adjustment.

Action on your request for an extension to your contract time of six months will be deferred until the completion of these changes at which time your statement, supported by substantiating evidence, of the exact number of days that the project as a whole was delayed due to these changes will receive consideration.

A copy of this letter will be forwarded to the District Engineer and to the Construction Engineer at the building.

On September 21, 1937, the acting Director of Procurement by letter thereto advised the plaintiff that inasmuch as the aforementioned sum of $12,820.00 had been "deducted from your contract" as an equitable adjustment, monthly payments would be resumed, in accordance with the terms of the contract, disclaimed any abandonment or breach of contract, expressed dissatisfaction with progress of the work, and demanded expedition.

The plaintiff appealed to the Secretary of the Treasury October 14, 1937, from the contracting officer's decision reducing the contract price of $12,820.00, asserting it was, instead, entitled to an addition of $92,890.49, and stated it was willing to have the decision on appeal postponed until field costs came in.

17. On the 14th of January 1938, the plaintiff submitted to the Procurement Division the following proposal, in substitution of that made September 8, 1937 (Finding No. 15):

Re: Poughkeepsie, N. Y., Post Office.

REVISED PROPOSAL NO. 11

Additional cost involved.

In accordance with your order of August 20, 1937, and your revised drawings #100–B, 101–B, 102–B, 201–B, 202–B and in accordance with your memorandum specifications dated August 20, 1937.

			Additions	Deductions
I. Field stone in lieu of Split Face Granite (Sheet #1).				
Add: Résumé of Cost of Field Stone to Jan. 7, 1938			$48,106.87	----------
Add: Estimate of cost of completing Field Stone			4,210.00	----------
Deduct: Cost of original Split Face Granite Subcontract		$20,948.75		
Less cost of cancellation	$3,000.00			
Less cost of 1½ sample panels	244.80	3,244.80		
Net Deduction		17,703.95	----------	$17,703.95
II. Miscellaneous changes (Sheet #2)			11,459.90	3,608.20
III. Other Deductions:				
(a) Cut Bluestone omitted 2,750 cu. ft. at $2.50			----------	6,875.00
(b) Cut Bluestone setting omitted 2,750 cu. ft. at 80¢			----------	2,200.00
			63,776.77	30,387.15
General Contractor Overhead 10%			6,377.68	----------
			70,154.45	----------
General Contractor Profit 10%			7,015.44	----------
			77,169.89	----------
Less Deductions			30,387.15	----------
			46,782.74	----------
Bond 1½%			712.43	----------
			47,495.17	----------

The above sum makes no provision for additional overhead due to the delays involved because of the above indicated changes, or for additional temporary heat that may be required. For these items, we shall make claim at a later date when they may be more definitely determined.

18. Following conferences between representatives of plaintiff and of defendant, the plaintiff on April 5, 1938, submitted to the Procurement Division the following revised proposal in connection with the B changes:

Re: Poughkeepsie, N. Y., Post Office.

REVISED PROPOSAL NO. 11

In accordance with your order of August 20, 1937, and your revised drawings #100–B, 101–B, 102–B, 201–B,

202–B and in accordance with your memorandum specifications dated August 20, 1937, and in accordance with the result of a series of conferences with your Department culminating April 1st, 1938.

Additions—Agreed upon by Treasury Department representative, Mr. Lund, April 1st, 1938

1. Field Stone: Materials	$6,772.87
2. Field Stone: Labor to Jan. 4th, Inclusive	28,620.93
3. Field Stone: Labor Adjustment	124.79
4. Field Stone: Carpentry on Scaffolds & Arch Centers	2,009.63
5. Field Stone: Labor Removing Stone. (Debris (Jan. 5th to Feb. 25, 1938))	219.00
6. Field Stone: Trucking Stone Debris to Feb. 25th	147.00
7. Field Stone: Estimate to Remove Balance of Stone Debris—Lump Sum	400.00
8. Field Stone: Labor Cleaning Snow	30.60
9. Metal Furring & Plaster in Lieu of Hollow Tile & Plaster	3,437.10
10. Parging including 2nd Floor Slushing:	
Labor	1,079.95
Material	529.76
11. Parging: Labor Timekeeper	40.00
12. Dampproofing	910.00
13. Metal Fins on Wood Windows	1,139.60
14. Copper Flashing on Windows	1,380.20
15. Miscellaneous Foundation Changes	500.00
16. Pipe Space: Mezzanine Floor	10.00
17. Main Entrance Platform Changes	1,639.20
18. Larger Mouldings on Hollow Metal Windows	401.00
19. Larger Mouldings on Wood Windows	610.00
20. Planer Finish on Top and Shot Finish on Sides of Sills and Coping in Lieu of Rubbed Finish	350.00
21. Additional Charge for Grounds on Metal Furring	125.60
22. Field Stone: Dismantling, Piling, and Hauling Scaffold Material	600.00
23. Field Stone: Labor Cleaning Down and Pointing Stone	1,494.80
24. Miscellaneous Bills	3,823.75
25. Insurance on Labor $33,464.31 at 13.264%	4,438.71
26. Social Security Tax on Labor $30,630.56 at 3% (1937)	918.92
27. Social Security Tax on Labor $2,833.75 at 4% (1938)	113.35
28. Insurance on Labor $280.39 at 13.264%	37.19
29. Social Security Tax on Labor $280.39 at 4% (1938)	11.22
30. Field Stone: Foreman Cleaning Debris	60.35
31. Insurance on Labor $60.35 at 13.264%	8.00
32. Social Security Tax on Labor $60.35 at 4% (1938)	2.41
Total agreed additions	61,985.33

Deductions—Agreed upon by Treasury Department Representative Mr. Lund April 1st, 1938

1. 3" Hollow Tile and Plaster Displaced by Metal Furning Lath & Plaster		$2,291.20	
2. 1" Granolithic Top Omitted from Main Entrance Platform		143.00	
3. Face Brick Displaced by Field Stone		754.00	
4. Common Brick Displaced by Field Stone		420.00	
5. Salvage on Scaffold Material		600.00	
Total agreed deductions			$4,208.20
Other additions			
1. Travel Expenses Due to Changes		$260.00	
2. Field Stone: Electric and Water (Pro-Rata)		50.00	
3. Field Stone: Acid & Brushes for Cleaning Down		176.00	
Total other additions			$486.00
Other deductions			
1. (a) Cost of Original Split Face Granite Subcontract		20,948.75	
Less Cost of Cancellation	$3,000.00		
Less Cost of 1½ Sample Panels	244.80	3,244.80	
Net deduction		17,703.95	
2. (b) Cut Bluestone Omitted 2,750 Cu. Ft. at $2.50		6,875.00	
3. (c) Cut Bluestone Setting Omitted 2,750 cu. ft. at $0.80		2,200.00	
Total other deductions			26,778.95
Total agreed additions		61,985.33	
Total other additions		486.00	
Total additions			62,471.33
General Contractor's Overhead, 10%			6,247.13
			68,718.46
General Contractor's Profit, 10%			6,871.85
			75,590.31
Less agreed deductions		4,208.20	
Less other deductions		26,778.95	
Total deductions			30,987.15
			44,613.16
Fire Insurance at $0.25 per hundred			111.53
			44,724.69
Bond 1½%			670.88
Total addition to our contract price			45,395.57

The above sum makes no provision for additional overhead due to the delays involved because of the above indicated changes; for additional temporary heat that may be required; for counsel fees that have been expended and may yet be expended; for interest on additional investment; for cost of litigation that may result due to cancellation of certain sub-contracts; for increased wages paid on other trades.

For these items we shall make claim at a later date when they may be more definitely determined.

We shall also require an extension of time in our completion date due to the radical changes involved.

19. On May 24, 1938, the contracting officer by letter advised the plaintiff that the determination of September 14, 1937, reducing the contract price by $12,820.00 on account of the B changes, was rescinded and that, pending final agreement as to an equitable adjustment, plaintiff would be paid an additional $23,000.00 to cover the B changes, and that extension of time for performance would await completion of performance.

20. On or about May 31, 1938, the plaintiff presented to the contracting officer the following statement as an addition to its proposal of April 5, 1938:

In accordance with your order of August 20, 1937, and your revised drawings #100–B, 101–B, 102–B, 201–B, and 202–B, and in accordance with your Memorandum Specifications dated August 20, 1937, and in accordance with a series of conferences with your Department culminating April 1st, 1938—

(A) Our proposal of April 5th, 1938, based on certain data agreed upon by your Mr. Lund, and other data substantiated by us	$45, 395. 57
(B) Items overlooked and not previously included in above figure:	
1. Watchman on Rubble Stone—15 weeks at $18.00	270. 00
2. Additional cost of travel expenses to Washington	843. 80
3. Additional cost of cancellation of Split Face Granite subcontract	307. 66
(C) Other additions not included in above figure and actually expended by us, due to the delays involved:	
1. Field expenses, $273.00 per week for 26 weeks)	7, 098. 00
2. Office Overhead, $205.50 per week for 26 weeks	5, 343. 00

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(C) Other additions not included in above figure and actually expended by us, due to the delays involved—Continued.	
3. Idle time for mason foreman due to Winter conditions, 4 weeks at $71.00	$284.00
4. Additional Fire Insurance on original contract of $330,000 for 6 months at 25¢ per hundred	412.50
5. Additional progress photos for 6 months	48.00
6. Additional minimum premiums on Compensation and Public Liability	466.60
7. Additional Hoist Rental due to Winter weather, 7 weeks at $30	210.00
(D) Counsel Fees	1,600.00
(E) Interest at 6% on additional investment in Job:	
1. On $12,820 deducted from 10-1-37 to 6-1-38, 8 months at 6%	512.80
2. On $45,395.57, from 10-1-37 to 2-1-38, 4 months—average at 2 months at 6%	453.96
3. On $45,395.57, from 2-1-38 to 6-1-38, 4 months at 6%	907.91
Total amount now due us	64,153.80

The above sum makes no provision for additional Temporary Heat that may be required; for counsel fees that may yet be expended; for cost of litigation that may result due to cancellation of certain subcontracts; for increased wages paid on other trades; for damages sustained by us in being unable to take on other work due to depletion of our resources resulting from failure of Procurement Division to make proper payments on account of these changes.

For these items we shall make claim at a later date when they may be more definitely determined.

21. On December 4, 1937, plaintiff requested payment for all the work done from that time on, on the ground that 50 percent of the entire contract had been completed. The defendant denied this request on December 7, 1937, on the ground that only 49 percent of the contract had been completed, whereas 86 percent should have been completed. Later plaintiff repeated this request, but it was again denied on April 11, 1938. On May 21, 1938, the contracting officer advised plaintiff that since 50 percent of the contract had been completed, and progress for the two preceding months had been normal, full progress payments would be made in the future.

22. On September 10, 1937, the acting Superintendent of Project Management notified plaintiff that shop drawings of

the Wyoming Cut Stone Company, Nos. 1–A and 3, superseding drawings 1 and 3, approved July 2, 1937, had been approved for jointing.

The first bluestone was delivered to the job September 24, 1937, and thereupon plaintiff started to set the bluestone base. This was completed on October 20, 1937.

The second floor concrete slab was completed on December 2, 1937, and the concrete skylight was poured on December 3, 1937.

The stone walls were topped out January 9, 1938, work on the partitions started January 27, 1938, and the roof sheathing completed on February 8, 1938. Roof slating was started March 7, 1938, and completed April 4, 1938. Progress in slating was slow due to slow deliveries of slate, which were in turn due to the fact that the slate came by truck from the northern part of New York or Vermont and traffic was impeded by winter weather.

The partitions were started January 27, 1938, and finished March 22, 1938.

The plaintiff began plastering April 11, 1938. Preliminary to this work the walls had to be parged with a mixture of cement on the inside and then damp-proofed. All this required interior temperatures ranging well above the freezing point and the walls had to be dried out. To do this, plaintiff employed temporary heat, but the temporary heat was not effective until the building had been well inclosed. This interior work was delayed by the necessity of keeping the frost out of the walls and by the comparatively slow drying out due to winter weather.

23. On September 23, 1938, the acting Director of Procurement notified the plaintiff that the Procurement Division, acting under Article 3 of the contract, had determined that $27,845.89 was a fair and reasonable amount to be paid for the work represented by the proposal of April 5, 1938, and May 31, 1938, and that payment would be made accordingly.

Details of this sum of $27,845.89 were furnished to the plaintiff October 18, 1938, by defendant's supervising engineer as follows:

	Additions	Deductions
1. Additions—items 1 to 32, incl. (your prop. 4/5/38)	$61,985.33	
2. Deductions—items 1 to 5, incl. (your prop. 4/5/38)		$4,208.20
3. Other additions.		
a. Electric & Water pro rata	50.00	
b. Acid & Brushes for cleaning down	176.00	
4. Additional traveling expenses	1,103.80	
5. Deductions—Split face granite and back-up:		
a. 12,330 c. f. split face granite at $1.25		15,412.50
b. 13,008 c. f. split face back-up at $0.45		5,853.60
c. 2,764 c. f. bluestone back-up at $0.45		1,243.80
d. Offset charges for scaffold, hoist, misc		2,467.90
e. Offset charges for removal of debris		300.00
6. Deduction for Bluestone & Setting:		
a. 2,915 c. f. Bluestone at $4.50		13,117.50
b. 2,915 c. f. Bluestone at $0.80		2,332.00
		44,935.50
Less cost of cancellation & miscellaneous		3,244.80
		41,690.70
7. Total Overhead	3,690.02	
8. Total additions	67,005.15	
9. Less Total Deductions	41,690.70	
	25,314.45	
Profit 10%	2,531.44	
Total	27,845.89	

24. From the determination of September 23, 1938, the plaintiff appealed to the Secretary of the Treasury October 22, 1938, increasing its claim as to the B changes from $64,153.80 to $65,293.32, and asserting claim for an additional $8,027.50 as compensation for the different kind of bluestone required by the defendant from that proffered by the plaintiff and rejected by the defendant.

The claim of $8,027.50 on 3,250 cubic feet of bluestone was the difference between the prices of $5.47 and $3.00 per cubic foot.

The increase of $1,139.52 in the claim on B changes is not resolved by the record into its elements.

25. On July 1, 1939, under the President's plan for reorganization, Act of 1939, the functions of the Public Buildings Branch of the Procurement Division, Treasury Department, became vested in and were thereupon exercised by the Public Buildings Administration of the Federal Works Agency.

26. In the month of August 1939, it was arranged between Under Secretary of the Treasury John W. Hanes and Administrator John M. Carmody of the Federal Works Agency,

that the Under Secretary of the Treasury would render a final determination on the plaintiff's appeal and that the Administrator would express his concurrence therein, if he did concur.

This procedure was decided upon in order to meet objections that might be raised as to jurisdiction.

27. On December 28, 1939, Under Secretary Hanes rendered his decision on the appeal, as the representative of the Secretary of the Treasury, and this decision was formally concurred in by John M. Carmody as Administrator, Federal Works Agency. A copy of the decision was transmitted to the plaintiff January 8, 1940.

In this determination the plaintiff was allowed a net addition to its contract price of $30,393.93, and the additions to the contract price and the credits to the Government were tabulated as follows:

	Additions	Credits
1. Thirty-two agreed items [see Finding No. 18 *supra*]	$61, 985. 33	
2. Traveling expenses	1, 103. 80	
3. Water, cleaning, etc	50. 00	
4. Acid and brushes	176. 00	
5. Watchman's compensation	313. 91	
6. Cancelation of subcontract	3, 307. 66	
7. Sample panels	244. 80	
8. Profit	2, 763. 08	
9. Bond	455. 91	
10. Additional fire insurance	262. 02	
11. Superintendent's salary	1, 950. 00	
12. Assistant Superintendent's salary	520. 00	
13. Watchman's services	260. 00	
14. Mr. Lasker's lodging	130. 00	
15. Railroad fare	104. 00	
16. Electricity	65. 00	
17. Telephone and sundries	150. 00	
18. Progress photos	27. 69	
19. 3" hollow tile omitted		$2, 634. 88
20. Face brick omitted		942. 04
21. Common brick omitted		483. 70
22. 1" granolithic top omitted		143. 00
23. Salvage on scaffold material		600. 00
24. Bluestone omitted		15, 457. 30
25. Bluestone setting omitted		2, 265. 60
26. Split face granite and backup omitted		20, 948. 75
Totals	73, 869. 20	43, 475. 27
Net addition	30, 393. 93	

Findings Nos. 2 and 3 of the joint decision of December 28, 1939, are as follows:

> 2. That the present claim is for the additional cost to the contractors occasioned by changes in plans forwarded to the contractors August 20, 1937, by the Procurement Division, relating to changes above the first

floor level; but that, so far as the claim for delay is concerned, this claim relates to delays occasioned by changes specified in the letter of August 20, 1937, and by changes below the first floor level, as ordered by Procurement Division's letter of August 19, 1937 (undated).

3. That the principal change in the plans effected by the Procurement Division's letter of August 20, 1937, was the substituton of field stone for split face granite and this change, together with the other changes contained in the specifications accompanying the Procurement Division's letter of August 20, 1937, were within the general scope of the contract as provided in Article 3 thereof.

The joint decision concluded:

It is therefore ordered that pursuant to Article 15 of the contract dated January 26, 1937, the claimant Silberblatt & Lasker, Inc., be, and it is hereby awarded, subject to payments previously made, the sum of $30,393.93 in full satisfaction of its claim against the United States.

In the appeal to the Secretary of the Treasury October 22, 1938, there was included a separate claim of $8,027.50, being the difference between prices of $3.00 and $5.47 per cubic foot on 3,250 cubic feet of bluestone.

This was disposed of in the joint determination of the Under Secretary of the Treasury, and the Administrator, Federal Works Agency, December 28, 1939, in the following terms:

7. That it further appears that no monopoly existed with reference to North River bluestone since the evidence shows that the contractors procured proper bluestone from a company which submitted a lower bid than that submitted by the alleged monopolistic producer of bluestone.

8. That the cost of $5.47 per cubic foot for North River bluestone is not an unreasonable charge and the contractor's claim for credit representing the difference between this cost and that for which it is alleged another type of similar stone could be procured is therefore disallowed.

9. That in computing the credit due to the United States for the omission of bluestone the unit price of $5.47 per cubic foot is the proper basis for credit.

There is no evidence in the case of a break-down of the contract price into its elements, with attendant information sufficiently satisfactory to enable one to fix an appropriate proportion of the contract price applicable to the bluestone. The contract does not contain unit prices and the contractor's detailed estimate of its bid is not in evidence.

28. The plaintiff did not agree to all the foregoing determination and now claims revision thereof in additional amounts as follows, none of which has been paid the plaintiff:

8. Profit on additional work $6,877.77, only $2,763.08 allowed, difference	$4, 114. 69
9. Premium on performance bond $753.13, only $455.91 allowed, difference	297. 22
10. Fire insurance $511.50, only $262.02 allowed, difference	249. 48
14. Board for superintendent $390.00, only $130 allowed, difference	260. 00
17. Telephone and sundries $650, only $150 allowed, difference	500. 00
18. Progress photos $48, only $27.69 allowed, difference	20. 31
19. 3'' hollow tile deduction $2,634.88, limit to $2,292, difference	342. 88
20. Face brick deduction $942.04, limit to $754.00, difference	188. 04
21. Common brick deduction $483.70, limit to $420.00, difference	63. 70
24. Bluestone deduction $15,457.30, limit to $6,875.00, difference	[1] 8, 582. 30
27. Overhead on increased work (not allowed)	6, 252. 52
28. Fire insurance on increased value (not allowed)	128. 41
29. Attorney's fee (not allowed)	1, 600. 00
31. Masonry foreman salary (not allowed)	333. 03
32. Rental of hoist (not allowed)	210. 00
33. Public liability and compensation insurance (not allowed)	466. 60
34. Central office overhead (not allowed)	5, 076. 85
35. Loss by reason of additional investment	2, 531. 36
	$31, 217. 39

[1] Based on difference in price between $5.47 and $2.50 per cubic foot.

The items of (17) telephone and sundries $500.00, (19) 3'' hollow tile deduction $342.88, (20) face brick deduction $188.04, (21) common brick deduction $63.70, and (14) board for superintendent $260.00 were not included by plaintiff in its appeal to the head of the department. The items so omitted by plaintiff in its appeal were considered and passed upon in the joint decision.

29. At the conclusion of performance the contracting officer extended the contract time to cover all delays except four days, and for these four days he assessed and withheld from the contract price liquidated damages under Article 9 of the contract, amounting to $280.00. From this assessment and deduction the plaintiff appealed to the head of the Treasury Department, and the action of the contracting officer was affirmed by the Federal Works Administrator October 26, 1940, and the plaintiff so notified. There is no evidence of sufficient probative value to disturb the finding of the contracting officer.

30. There is no proof that the heads of the Treasury Department and of the Federal Works Agency, or those acting for them, did not exercise a fair and impartial judgment in the consideration of plaintiff's appeal, or that the decision rendered was grossly erroneous in point of fact.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues the defendant for the sum of $31,875.28, alleging that it breached its contract with plaintiff for the construction of a post office at Poughkeepsie, New York, in that it changed the stone to be used in the construction of the building from bluestone and granite to rubble stone. Plaintiff also says that liquidated damages for 4 days' delay were improperly deducted, and that it was required to use a bluestone which was more expensive than that specified in the specifications.

The building was originally designed to be faced with bluestone below the level of the first floor and with split-face granite above the level of the first floor, with a belt course, quoins, window sills, lintels, and arches of bluestone. This was changed to call for a building constructed of rubble or field stone and certain bluestone.

The original contract provided for a consideration of $330,000. The head of the department found that the changes entitled plaintiff to an equitable adjustment of its contract price in the amount of $30,393.93. Plaintiff says

that these changes were beyond the scope of the contract and, therefore, do not come within the provisions of article 3 thereof permitting the contracting officer to make changes within the general scope of the contract. The change was merely from one character of stone to another, and in our opinion was within the general scope of the contract. Cf. *General Contracting and Construction Co.* v. *United States*, 84 C. Cls. 570. Even if the change was beyond the scope of those permitted, the plaintiff acquiesced in the making of it; it claimed no breach of contract, but continued performance of it as changed. The change made, therefore, is governed by articles 3 and 15 of the contract.

Article 3 permits the making of changes and provides for an equitable adjustment in the amount due under the contract and for an adjustment in the time required for its performance. Plaintiff originally submitted a proposal for an increase in the contract price of $86,568.97 for doing the work as changed, but later increased this to $92,959.26. However, this was later reduced to $45,395.57, but this figure did not include additional overhead due to delays incident to the changes made, additional temporary heat, and other items. The contracting officer considered this proposal excessive and proceeded to determine the dispute under article 15 of the contract. This article provided, in part:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, * * *.

Since what constitutes an equitable adjustment is a question of fact (*United States* v. *Callahan-Walker Construction Co.*, 317 U. S. 56), this article authorized the contracting officer and the head of the department to settle the dispute. It was a dispute over the equitable adjustment to be made for a change authorized by article 3, and, therefore, was a dispute arising under the contract, except for any damages that may have been incurred because of any unreasonable delay in deciding on the change. Article 3 contemplates that changes desired should be made without unreasonably delaying the contractor. If there was an

unreasonable delay, there was a breach of the contract. *Magoba Construction Co.* v. *United States*, 99 C. Cls. 662, 690. Such a dispute the contracting officer is not authorized to decide finally; his authority is limited to disputes "arising under the contract"; it does not extend to disputes over a breach of the contract, for this is one arising outside of the contract.' Cf. *Langevin* v. *United States*, No. 43903, decided May 3, 1943 (100 C. Cls. 15).

Plaintiff, however, does not claim there was an unreasonable delay in making the changes and we assume there was none. Therefore, the dispute over what was an equitable adjustment on account of the change was a dispute arising under the contract, which the contracting officer was authorized to decide.

The contracting officer found that an equitable adjustment of $23,000 was proper. Plaintiff appealed to the head of the department, who, after evidently careful consideration, rendered an opinion holding that $30,393.93 was the proper equitable adjustment.

Article 15 makes his decision on such a question final and conclusive. There is nothing in the record to show that his action was arbitrary or capricious or was grossly erroneous; on the contrary, the authorized representative of the head of the department, the Honorable John W. Hanes, then Under Secretary of the Treasury, evidently gave the matter careful and painstaking consideration. We, therefore, are concluded by his findings, with the exception above stated, unless the plaintiff is correct in saying that they are void and of no effect because concurred in by John M. Carmody, Administrator of the Federal Works Agency.

At the time the contract was entered into the Public Buildings branch of the Procurement Division was under the jurisdiction of the Treasury Department, but on July 1, 1939, its functions were vested by Executive Order in the Public Buildings Administration of the Federal Works Agency. For fear there might be some question as to the proper person to settle disputes arising under the contract, it was arranged between the Under Secretary of the Treasury and the Administrator of the Federal Works Agency that the Under Secretary would render a decision in the

case and would submit it to the Administrator for review. This was done, and the Administrator concurred in the decision of the Under Secretary. The fact that he agreed with the Under Secretary's decision did not make it any the less the decision of the Under Secretary. The proof shows that his decision was rendered without prior conference with the Administrator and was uninfluenced by the views of the Administrator. But even though there had been a prior conference between these two men, there is nothing whatever in the proof to show that the judgment of the Administrator of the Federal Works Agency was substituted for the judgment of the Under Secretary. Whether or not in arriving at his judgment he may have secured the opinion and advice of a stranger to the contract, there is nevertheless nothing to show that the judgment rendered by him was not his own independent judgment. *Jacob Schlesinger, Inc.* v. *United States*, 94 C. Cls. 289, 307; cf. *Public Service Commission of Missouri, et al.*, v. *Brashear Freight Lines, Inc., et al.*, 312 U. S. 621, 626.

We are of opinion that the provisions of the contract have been complied with and that the plaintiff is bound by the decision made. Plaintiff claims damages for the delay caused it by making the change. Such damages cannot be recovered unless there was unreasonable delay in making the change. *Magoba Construction Co.* v. *United States*, *supra*. Cf. *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61. Plaintiff does not claim there was an unreasonable delay in making the change, but if it had made this claim, we do not think recovery could be predicated thereon.

The plaintiff was first notified that a change was desired in the stone to be used in constructing the walls on February 26, 1937. Its proposal for doing the changed work was requested on that date. A conference followed on March 12, 1937, at which plaintiff was directed to erect a panel of a sample wall, using a certain sort of stone, as it was required to do under the contract. About a month later, this panel not having been erected, plaintiff was again directed to do so. This was finally done on April 21, 1937. Between this date and August 8 there were a number of other panels erected, some by plaintiff and some by the defendant. On August 8 the character of wall to be erected was determined upon.

It took the defendant, therefore, 3 months and 17 days to make up its mind on what it wanted. During this time there was some delay caused by plaintiff's delay in erecting other panels, but, even so, 3 months and 17 days was quite a long time to take to decide on the change to be made, but it does not appear that plaintiff was materially damaged thereby, nor does the extent of the damage, if any, appear.

The changes in contemplation related to work above the bluestone base on the top of the foundation walls and, therefore, plaintiff was free to proceed meanwhile with the excavation, the construction of the foundation walls, and the laying of the bluestone base on the top of the foundation walls. Until all this had been done, plaintiff was not ready to proceed with the work, the changing of which was under contemplation.

Plaintiff was responsible for considerable delay in setting the bluestone base. It started excavation on April 5, 1937, and by July 5, 1937, had completed the construction of the foundation to a point where it could begin setting the bluestone base. However, there was considerable delay in securing approval of the bluestone to be used. A sample of this stone was first submitted on March 11, 1937, but was rejected as not conforming to the specifications. It was nearly two months before another sample was submitted, but this also was rejected.

Finally, about a month later, plaintiff submitted a sample which was finally approved as conforming to the specifications. Thus a little over three months elapsed before plaintiff submitted a sample of bluestone which conformed to the specifications. The shop drawings for the bluestone base course were not approved until July 2, 1937. The proof shows that it took about three weeks to fabricate the stone. Actually the first bluestone was delivered to the job on September 24, 1937. Defendant was responsible for seven days of this delay, from August 12, 1937, when it stopped fabrication of the bluestone, until August 19, 1937, when it ordered resumption; but allowing for this delay, it would not have been delivered until September 16 or 17. It took plaintiff 26 days after it was delivered on the job to set it. So that plaintiff would not have been ready to erect the walls on top of this bluestone until October 13. This was a month

and 22 days after the change order for the rubble stone was issued. It would seem that this was ample time for plaintiff to have collected its material and equipment for the construction of the walls.

It is not apparent that the change delayed plaintiff, or if so, how much.

The Under Secretary, however, allowed plaintiff certain expenses it claimed for a 13 weeks' delay (plaintiff claimed 26 weeks' delay). He did not allow all the expenses claimed. Plaintiff may or may not have incurred additional expenses during whatever delay there was, but the extent of this delay, if any, we are unable to determine from the proof.

We are of the opinion plaintiff has been fairly, if not generously, treated on this item of its claim.

Plaintiff is bound by the decision of the head of the department in assessing 4 days liquidated damages. The contract was completed 285 days late. It was held that plaintiff was not to blame for 281 of the days, but that it was to blame for 4 days. Article 9 of the contract authorizes the contracting officer to ascertain the facts and extent of the delay and to extend the time for completion, and it provides that "his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

Again there is no showing whatever of any arbitrary, capricious, or grossly erroneous action and, therefore, his decision is final.

Plaintiff's third item of claim is that it was required to use a bluestone which was more expensive than that specified in the specifications. Plaintiff submitted several samples of bluestone, as stated, but the contracting officer held that they did not comply with the specifications and rejected them, until plaintiff finally did submit a sample which was satisfactory. Whether or not the samples submitted complied with the stone specified by the specifications was a question of fact, the decision of which was committed to the contracting officer.

Moreover, the specifications provided that the "decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final." Under both the contract proper and the specifications the contracting officer's decision on whether or not the sample complied with the specifications is binding on the plaintiff.

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

STANDARD RICE COMPANY, INC., v. THE UNITED STATES

[No. 45584. Decided February 7, 1944]*

On the Proofs

Processing tax under Agricultural Adjustment Act; amount withheld as unpaid processing tax on rice sold to Government under the contract is recoverable.—Where the plaintiff on November 13, 1935, agreed to sell to the Government a stated quantity of rice under a contract which provided that the bid price included any federal tax "heretofore imposed by Congress which is applicable to the material" involved and that any tax "which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoice as a separate item"; and where the Government paid to the plaintiff the full contract price on the rice delivered; and where the plaintiff did not pay any processing tax for rice milled after September 1935 due to the fact that the Agricultural Adjustment Act, under which the tax was imposed, was declared unconstitutional; it is *held* that the plaintiff is entitled to recover the amount, subsequently withheld by the Government from sums admittedly due to plaintiff for overpayments of income taxes, representing unpaid processing taxes claimed by defendant to be due under the contract involved.

*Defendant's petition for writ of certiorari granted June 12, 1944.

Same; no implied agreement to reduce price if tax not paid; U. S. v. Kansas Flour Mills distinguished.—There was no implication in the instant contract that if the taxes were not paid the contract price would be reduced. The court distinguishes the decision of the Supreme Court in the case of *United States v. Kansas Flour Mills Corporation*, 314 U. S. 212, where the processing tax was specifically mentioned and where it was specifically provided that if any change in the tax was made by Congress the price was to be adjusted up or down accordingly.

Same; ambiguities in Government contract.—Ambiguities in a contract drawn by the Government should be resolved against the Government.

Same; Government as contractor.—In general, the Government as contractor should be treated by the law as other contractors similarly circumstanced are treated.

Same.—The decisions of the U. S. Circuit Court of Appeals in *United States v. American Packing and Provision Co.*, 122 Fed. (2) 445, and of the United States District Court in *Suncook Mills v. United States*, 44 Fed. Supp. 744, are not followed.

The Reporter's statment of the case:

Mr. Milton K. Eckert for the plaintiff. *Mr. John C. White* was on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of the parties:

1. Plaintiff, Standard Rice Company, Inc., is a corporation organized and existing under the laws of the State of Texas, having its principal office in Houston, Texas, and at all times mentioned herein was engaged in the business of milling rice for sale to various buyers, including the United States.

2. Each sum hereinafter stated to have been paid by plaintiff was paid to the Collector of Internal Revenue for the First District of Texas and was thereafter deposited by him with the Treasurer of the United States in the usual course of business.

3. October 15, 1935, plaintiff filed with the Collector of Internal Revenue for the First Texas District, its federal

income tax return for the fiscal year ended July 31, 1935, disclosing a tax due of $25,502.43, which amount plaintiff paid to the Collector in four equal installments, one each on October 15, 1935, January 15, 1936, April 15, 1936, and July 15, 1936.

4. Thereafter, one of the field agents of the Commissioner of Internal Revenue audited plaintiff's income tax return for the fiscal year ended July 31, 1935, and determined that plaintiff had made an overpayment in income tax for that year in the amount of $2,334.23. In due course, the Commissioner of Internal Revenue caused a certificate of overassessment No. 1408269 to be issued showing that this sum was owing to plaintiff. A copy of this certificate is attached to the petition herein as Exhibit A, and is incorporated herein by reference.

5. Payment not having been made on the overassessment, for reasons set forth in finding 15, plaintiff, on June 13, 1938, filed with the Collector of Internal Revenue for the First District of Texas its claim for refund of said sum of $2,334.23, being the overpayment of income taxes for the fiscal year ended July 31, 1935. Plaintiff has not received notice from the Commissioner of Internal Revenue by registered mail, or otherwise, of the disallowance of such claim for refund, or of any part thereof, but was advised by the Commissioner, by letter dated September 20, 1938, that in view of the fact that the refund of income tax had been withheld by the Comptroller General in connection with plaintiff's alleged indebtedness to the United States for processing taxes, the claim had been forwarded to that official for consideration and appropriate action.

6. October 15, 1938, plaintiff filed with the Collector of Internal Revenue for the First Texas District its federal income tax return for the fiscal year ended July 31, 1938, disclosing a tax due of $25,677.99, which amount plaintiff paid to the Collector, in four installments, one each on October 15, 1938, and January 15, April 15, and July 15, 1939.

7. October 13, 1939, plaintiff filed claim for refund for the tax for the fiscal year ended July 31, 1938, in the amount of $25,677.99, with the Collector of Internal Revenue for the First Texas District. This claim was based upon the ground

that instead of having a net taxable income for the fiscal year ended July 31, 1938, plaintiff had sustained a net loss for that year, and that consequently the income tax had been erroneously and illegally paid and collected. Thereafter, field agents of the Commissioner of Internal Revenue audited plaintiff's income tax return for the year in question and determined that there had, in fact, been an overpayment by plaintiff of tax in the amount claimed. In due course, the Commissioner of Internal Revenue caused certificate of overassessment No. 2544993 to be issued showing that this sum, $25,677.99, was owing to plaintiff. A copy of this certificate of overassessment is attached to the petition herein as Exhibit B, and is incorporated herein by reference.

8. February 6, 1941, plaintiff received a partial refund from the United States of the overpayment of income tax for the year ended July 31, 1938, such partial payment amounting to $19,532.62, plus interest thereon in the amount of $2,018.13. Refund of the balance of $6,145.37 has not been made, for the reasons set forth in finding 16.

9. Since the filing of the claim for refund for $25,677.99 on account of overpayment of income tax for the fiscal year ended July 31, 1938, mentioned in finding 7, plaintiff has not received notice from the Commissioner of Internal Revenue by registered mail or otherwise, of the disallowance of such claim for refund or any part thereof.

10. November 13, 1935, plaintiff entered into a contract with the defendant, being contract No. NOs-45097 a copy of which is attached to the petition herein as Exhibit C, and is made a part hereof by reference, under which plaintiff agreed to supply rice to the Navy Department at the bid prices specified in the contract, a typical price provision of which reads as follows:

Item	*Pounds (about)*	*Unit price (per pound)*	*Total*
1. Rice	290,000	.046	$13,340.00

11. The contract contained, in schedule 5916, the following provision:

Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts,

revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

12. Under the terms of the contract, plaintiff delivered to the United States 584,800 pounds of milled rice, and received full payment from the United States, in accordance with the terms of the contract in December 1935, and January, February, and March 1936.

13. Plaintiff, as the first domestic processor of rice, paid the processing taxes imposed by the Agricultural Adjustment Act of May 12, 1933, as amended, from April 1, 1935, to September 20, 1935. Before paying the processing tax on the rice processed for the month of October 1935, plaintiff applied to, and obtained from, the United States District Court for the Western District of Texas (No. 577 in Equity) an injunction against the Collector of Internal Revenue, prohibiting the collection from it of any further processing taxes, and no processing taxes were paid by the plaintiff after the month of September 1935. Plaintiff particularly did not pay to the United States or any of its officers processing taxes imposed upon it under the authority of the Agricultural Adjustment Act, as amended, on the supplies furnished to the United States under Contract NOs-45097, amounting to the sum of $8,479.60.

14. The Comptroller General, on behalf of the United States, as more fully set forth in finding 15, asserted a claim against plaintiff for $8,479.60 (being United States claim No. 0280086), on the theory that there had been an overpayment by the United States on contract No. NOs-45097, since plaintiff had failed to pay the processing tax on the rice delivered under the contract. In computing the amounts claimed, the Comptroller General used $.0145 per pound of milled or clean rice as the equivalent of the processing tax of $.01 per pound of rough rice. This conversion factor of $.0145 per pound was established by Regulations made, pursuant to the Agricultural Adjustment Act, by the Secretary of Agriculture, with the approval of the President, dated March 30, 1935, as revised and, in part, superseded by

Regulations made by the Acting Secretary of Agriculture, with the approval of the President, dated July 31, 1935, Treasury Decision 4586. The amount of $8,479.60 claimed by the Comptroller General was computed as follows:

Item	*Quantity, Pounds*	*Tax Rate Per Lb.*	*Total Tax*
Rice	584,800	.0145	$8,479.60

15. As stated in finding 5, payment of $2,334.23 under certificate of overassessment No. 1408269, issued by the Commissioner of Internal Revenue on account of plaintiff's overpayment of income taxes for the fiscal year ended July 31, 1935, was withheld by the Comptroller General, who, on July 30, 1937, and January 10, 1938, issued his Notices of Settlement of Claim of the General Accounting Office (certificate No. 0455908, dated July 30, 1937, and certificate No. US–4738–Navy, dated January 10, 1938; claim No. 0280086), in which he certified that $2,334.23 was due to plaintiff on account of income tax overassessed for the taxable year ended July 31, 1935, but that this sum had been credited by him against the alleged indebtedness of $8,479.60 under contract No. NOs–45097, leaving a balance on said indebtedness of $6,145.37. Copies of these Notices of Settlement of Claim of the General Accounting Office are attached to the petition herein as Exhibits D and E, and are incorporated herein by reference.

16. As stated in finding 8, payment of $6,145.37 under certificate of overassessment No. 2544993, issued by the Commissioner of Internal Revenue for $25,677.99 on account of plaintiff's overpayment of income taxes for the fiscal year ended July 31, 1938, was withheld by the Comptroller General who, on April 24, 1941, issued his Notice of Settlement of Claim of the General Accounting Office (claim No. 0280086 (3)), in which he stated that $6,145.37, representing refund to plaintiff of income tax overassessed for the taxable year ended July 31, 1938, was allowed in full, but that this sum was being credited by him against the balance of $6,145.37 of the alleged indebtedness under contract No. NOs–45097. Copy of this Notice of Settlement of Claim of the General Accounting Office is attached to the petition herein as Exhibit F, and is incorporated herein by reference.

17. On or about October 28, 1939, plaintiff paid to the Collector of Internal Revenue for the First Texas District $72,072.30 in unjust enrichment taxes, imposed by Title III of the Revenue Act of 1936, on account of its having been relieved of the payment of processing taxes as set out in finding 13 above. This unjust enrichment tax was computed and assessed upon the basis of the inclusion of units involved in the claim of the Comptroller General. If those units had been excluded, the correct unjust enrichment tax would have been $70,365.71, a difference of $1,706.59.

18. No part of the overpayments of income tax for the fiscal years ended July 31, 1935, and July 31, 1938, which were withheld by the Comptroller General, as shown in findings 15 and 16, has ever been refunded, or repaid, except by credits made by the Comptroller General against the alleged indebtedness of plaintiff to the United States as above set forth.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, whose business was milling rice, made, on November 13, 1935, a contract to sell a large quantity of milled rice to the Government, for the Navy. The contract contained the following paragraph:

> Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoice as a separate item.

The plaintiff, as the first domestic processor, paid the processing taxes, imposed by the Agricultural Adjustment Act, for the rice which it milled from April 1, 1935, to September 20, 1935. It obtained an injunction against the further collection of the taxes, and paid no tax for rice milled after September 1935. It milled the rice, which it delivered under its contract with the Government, after September, and paid no processing taxes on it. The taxes would have

been, if paid, $8,479.60. In January 1936, the Supreme Court of the United States held the Agricultural Adjustment Act unconstitutional. *United States* v. *Butler*, 297 U. S. 1. The taxes were, therefore, never collected, as taxes.

For the years 1935 and 1938, the plaintiff overpaid its income taxes by some $28,000. The Government conceded the overpayment, but the Comptroller General, asserting that the plaintiff owed the Government $8,479.60, the equivalent of what the processing taxes would have been on the rice contract, withheld that amount from the plaintiff's income tax refund. The plaintiff, denying its liability for the processing taxes or their equivalent, sues for the amount withheld.

As appears in finding 17, the plaintiff paid a large sum in 1939 as unjust enrichment taxes under Title III of the Revenue Act of 1936, apparently because it had collected from various purchasers processing taxes which it had not itself paid. Included in the transactions upon which these taxes were based were some units of the sales to the United States, as to which the Comptroller General held that the plaintiff owed the United States the amount of the unpaid processing taxes, which amount that official collected for the United States by the set-off complained of in this suit. The amount of the unjust enrichment taxes so collected which was attributable to the sales of rice to the United States, here in question, was $1,706.59. The plaintiff claims, in the alternative, that it should recover at least that amount, and the Government concedes the validity of that claim.

The Government justifies the Comptroller General's action in collecting from the plaintiff by set-off the entire amount which the plaintiff would have had to pay, as taxes, if the Supreme Court had not held the Agricultural Adjustment Act unconstitutional, on the ground that the Government and the plaintiff, when they made the contract for the milled rice, contemplated that the tax would be paid, and included the tax in the contract price. The Government's theory seems to be that this contemplation, in the circumstances, rose to the dignity of an implied term of the contract to the effect that if the taxes were not paid, the contract price would be correspondingly reduced. It relies on

the case of *United States* v. *Kansas Flour Corporation*, 314 U. S. 212, where the Supreme Court held that, under a contract differing somewhat from the plaintiff's contract, the United States could recover the amount of the tax in a quasi-contract suit, under state law, to prevent unjust enrichment. In that case the contract provided that if any sales tax, processing tax or other taxes or charges "are imposed or changed by the Congress after the date set for the opening of the bid * * * and are paid to the Government by the contractor * * * then the prices named in this contract will be increased or decreased accordingly * * *."

The Government recognizes, of course, that the language of the contract involved in the *Kansas Flour Corporation* case was much more pointed, since it had in it a direct "up and down" clause relating the contract price to the amount of the tax. If, in that case, Congress had reduced or repealed the tax, the Government would have been entitled, by the very letter of the contract, to get back a corresponding part of the price paid. Whatever difficulties the case presented were caused by the fact that the contractor there had been relieved from paying the tax, as a tax, not by a repeal by Congress, but by the tax statute becoming unenforceable because of the Supreme Court's decision in *United States* v. *Butler*, *supra*. The Supreme Court was at pains to point out, in the *Kansas Flour Corporation* case, that Congress had, after the Butler decision, recognized, in legislation, the invalidity of the processing tax and had enacted the unjust enrichment tax, and that therefore there had been a change, by Congress, within the meaning of the contract there in question.

Because of the difference in the language of the two contracts, the *Kansas Flour Corporation* case, *supra*, is not a direct precedent against the plaintiff in this case. However, the Government points out that the Supreme Court used the following language, and urges that the language is applicable to the plaintiff's contract. The court said:

> In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—

the vendor—is protected from the payment of the tax by injunction does not reduce the price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his customers. In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage. Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected. The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction, in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax.

We are persuaded that there is a vital difference between the plaintiff's contract and that in the *Kansas Flour Corporation* case. In the Kansas case the processing tax was expressly mentioned, as the Supreme Court observes. In our case it is not mentioned by name, and there is no indication in the contract, or in any proved circumstance of the contract, that the parties had this tax in mind any more than they had tariff duties, for example, in mind. If Congress had reduced, or even repealed a tariff law applicable to rice, and if the plaintiff had thereupon imported rice and furnished it to the Government in fulfillment of its contract, we doubt whether the plaintiff would have been regarded as owing the amount of the tariff duty it would have had to pay, but for the repeal. Yet there would have been exactly as much reason for permitting the Government to sue for, or to offset the tariff duties of which the contractor was relieved, in that case as in the case of the processing tax.

We think that the language of the contract in the instant case does not express or imply an intention that the Government is to get, either as taxes or by offset or otherwise, the amount of any applicable federal tax which was in

existence when the contract was made. We think the tax provision of the contract, which was drawn by the Government and whose ambiguities should therefore be resolved against the Government, may very well have been meant only to foreclose any argument as to whether federal taxes were payable upon federal purchases and the steps preparatory thereto. The statement that prices bid "include" specified things is customary in Government contracts, as to various named things which will, or may, have to be done to fulfill the contract. Presumably the bidder adds something to his bid to cover these things, whether they are certain or contingent. Yet it has never been thought that if he gets the things that he must accomplish done cheaper, or escapes by good luck the expense of doing some or all of the contingent things, he should refund to the Government what it would have cost him to do them if costs had remained what they were when the contract was made, or if all the things that might have increased his costs had happened. We think that, in general, the Government, as contractor, should be treated by the law as other contractors similarly circumstanced are treated.

The fact that the contract expressly provided that if new (or perhaps increased) federal taxes were levied on the materials, the Government would refund those taxes, seems to us to argue strongly that the reverse was not intended to be implied from the parties' silence.

We recognize that the Circuit Court of Appeals for the Tenth Circuit, in *United States* v. *American Packing and Provision Co.*, 122 F. (2d) 445, treated contracts of the two types in the same way, and held with the Government as to both; and that the United States District Court for the District of Massachusetts, in *Suncook Mills* v. *United States*, 44 F. Supp. 744, held for the Government in a case involving a contract like the plaintiff's. We also recognize that the denial of certiorari by the Supreme Court in the *American Packing* case, *supra*, shortly after its decision in the *Kansas Flour Corporation* case, *supra*, may indicate that the language of the court in the *Kansas Flour Corporation* case was more broadly intended than we have supposed.

We conclude that the plaintiff is entitled to recover $8,479.60, with interest as provided by law.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

KANAWHA AND HOCKING COAL AND COKE COMPANY v. THE UNITED STATES

[No. 45679. Decided February 7, 1944]

On the Proofs

Bituminous Coal Act of 1937 applicable to sales of coal to the United States.—The Bituminous Coal Act of 1937 (55 Stat. 134) was applicable to sales of coal to the Government by a dealer who was a member of the Bituminous Coal Code, created under the Act, and the Government was obligated under the contract here in suit to pay the code price for coal purchased by it.

Same; intention of parties to the contract.—Where, in the invitation to bid on coal to be furnished for the Government, it was stated that if on the date of opening of bids there had been no judicial determination that the minimum price under the Bituminous Coal Act of 1937 was applicable to the Government the lowest bid would be accepted and that if before the date of opening the bids there had been such judicial determination then the code price would be paid instead of the bid price, if the bid price was lower; and where no such judicial determination had been made prior to the date of opening the bids but plaintiff had in letters to the Government's purchasing agent indicated, before delivery of coal under the contract, that it would comply with the requirements of the code, of which plaintiff was a member; it is *held* that under the terms of the invitation to bid and of the contract and the provisions of the statute the Government was obligated to pay the minimum code price for coal delivered under the contract, and plaintiff is accordingly entitled to recover.

Same.—The Government's agents who wrote the invitation for bids, which became a part of the contract, by the language used, manifested an intention to obey the law scrupulously, in the making of the contract if by the time of the making they knew what the law was; the language used gives no indication that they had prejudged the legal issues; and there was no indication that they thought that even if the law were to be held applicable

to sales to the Government, yet the Government could, with impunity, buy below the code price on the ground that the code price would be binding only on the seller.

Same.—The intent of the Government not to participate in, or to induce, a breach of its own laws if the proper interpretation of such laws should be made before the contract was made was shown by the words of the invitation to bid; and the statements made by the Government's agents and the circumstances after the contract was signed, show that their intent as to the meaning of the contract after its execution was not different.

Same.—Statements in the letter of September 1940, from the Government's purchasing agent to plaintiff's sales agent, saying there was a difference of opinion between the Bituminous Coal Division, Department of Interior, and the Comptroller General as to whether sales of coal to the Government were subject to the Act; and, further, that the specifications had been "designed to supply the needs of the Department for coal in a manner which will not be violative of the law, irrespective of what may be ultimately determined by the courts to be the law," indicate that the purchasing agent, when he drew the contract, intended to arrange for the needed supply of coal and to pay the code price for it if it should be "ultimately determined by the courts to be the law" that the Bituminous Coal Act was applicable to purchases of coal by the Government.

Same; Comptroller General's decision not binding.—The Comptroller General's decision as to the legal effect of the contract, which was the basis for the Government's refusal to pay the code price, is of no assistance in determining the intent of the parties to the contract, since that official had no part in making the contract.

Same; no intention of Congress to exempt Government from statute.—The Bituminous Coal Act (55 Stat. 134) was enacted to relieve a condition of chronic depression in the soft coal industry, and it was not the intention of Congress in the passage of the Act that the Government itself, as a purchaser of coal, should continue to benefit from the condition of depression and low prices which the Act was intended to relieve by increasing the price of coal to purchasers of coal generally.

Same.—There are indications on the face of the statute that it was intended to be applicable to sales to the Government, as shown by section 3 (e) and section 9 (c).

The Reporter's statement of the case:

Mr. C. F. Taplin for the plaintiff.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Philip Mechem* was on the brief.

The court made special findings of fact as follows, upon the report of a commissioner and a stipulation of the parties:

1. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, having its principal place of business in Charleston, West Virginia.

2. Plaintiff is, and at the times involved herein was, engaged in the mining and producing of bituminous coal at its three mines, Nos. 109, 114, and 116 (Mine No. 109 being particularly referred to herein), located in the Kanawha Subdistrict of West Virginia, in District No. 8 under the Bituminous Coal Act of 1937, 50 Stat. 72.

3. Plaintiff, under proper authority of its board of directors, executed and filed with the National Bituminous Coal Commission, Department of the Interior, its acceptance of the Bituminous Coal Code, which acceptance was dated June 18, 1937.

4. W. H. Warner and Company, Inc., intervenor herein, is, and at all of the times involved herein was, the exclusive sales agent of plaintiff, and was authorized to enter into negotiations with the Post Office Department for the sale to the department of plaintiff's coal. It is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in Cleveland, Ohio.

Its agency contract with plaintiff was duly filed with the proper statistical bureau of the Bituminous Coal Division of the Department of the Interior as provided by the marketing rules and regulations promulgated by that division and in effect since October 1, 1940. By virtue of those rules and regulations W. H. Warner & Co., as sales agent was required to observe all minimum price schedules and all provisions of the rules and regulations, including Rule No. 3, Section VI thereof. Sales by it at less than the minimum prices in effect would have subjected it to loss of its sales agency representation and to possible revocation of its license as a registered distributor, it having been granted Certificate of Registration No. 9432 by the Bituminous Coal Division March 23, 1940.

5. May 23, 1940, the Post Office Department issued invitations to bid for the furnishing to the Post Office at Cincinnati, Ohio, of coal meeting the requirements specified in Schedules 1 and 2 of the invitation.

May 31, 1940, W. H. Warner & Co., as exclusive sales agent for the plaintiff, bid for the contract, quoting a price of $2.50 per net ton f. o. b. dock, Trautman, Ohio. This bid was accepted by the defendant's purchasing agent August 9, 1940. Copies of the invitation and the accepted bid are attached to the petition as Appendix B and are made a part hereof by reference.

6. Article 6 of Schedule 2 referred to in finding 5 herein provided:

> If on the date of opening of bids there has been no judicial determination that the minimum prices under the Bituminous Coal Act of 1937 are applicable to contracts for furnishing coal to the United States Government, contract will be awarded the lowest responsible bidder conforming to the specifications. However, if before award is made there shall have been judicial determination that minimum prices apply to contracts for the furnishing of coal to the United States Government, the right is reserved to accept the lowest responsible bid conforming to specifications and substitute the minimum prices established by the Bituminous Coal Division, provided the bidder's price is less than the minimum fixed; or to reject all bids and readvertise.

7. August 8, 1940, H. A. Gray, director of the Bituminous Coal Division, Department of the Interior, entered an order in General Docket No. 15, making prices and marketing rules and regulations effective at 12: 01 a. m. on September 3, 1940. This date was extended to 12: 01 a. m. October 1, 1940, by order dated August 14, 1940.

By a Ruling of the Director, issued under date of September 25, 1940, by said H. A. Gray (which ruling is attached to the stipulation herein as Exhibit No. 8 and made a part hereof by reference), it was provided that after the minimum prices established in General Docket No. 15 had become effective on October 1, 1940, such prices should apply to all coal sold or offered for sale, with the proviso that "Unless the coal has been both sold and delivered at the time minimum prices become effective, the minimum prices are applicable."

The marketing rules and regulations referred to above are attached to the stipulations herein as Exhibit No. 9 and made a part hereof by reference. Attached also to the stipulations as Exhibit No. 10 is the schedule of minimum prices for District No. 8, being "Price Schedule No. 1," effective 12: 01 a. m. October 1, 1940, and this schedule is made a part of these findings by reference.

8. August 13, 1940, the Post Office Department issued its Purchase Order No. FB–1692 to W. H. Warner & Co., for 3,000 tons of Big Boy 109 2″ nut and slack coal at a price of $2.50 per net ton f. o. b. bidder's dock, Trautman, Ohio, to be shipped upon the order of the Postmaster at Cincinnati, Ohio. A copy of this purchase order is attached to the stipulations herein as Exhibit No. 1 and made a part hereof by reference thereto.

9. The receipt of the purchase order was acknowledged by W. H. Warner & Co., August 16, 1940, said acknowledgment (attached to the stipulation herein as Exhibit No. 2 and made a part hereof by reference) containing the statement:

> This contract price and order and the performance of all provisions thereof are expressly subject to the Bituminous Coal Act of 1937 and the proper orders and regulations issued thereunder by the Department of the Interior, Bituminous Coal Division. If and when governmental minimum prices are established, any part of the remaining tonnage forwarded during period of effective prices will be billed at the then-established governmental price.

By letter of August 16, 1940 (attached to the stipulation herein as Exhibit No. 3 and made a part hereof by reference), W. H. Warner & Co. wrote to the defendant's purchasing agent, acknowledging receipt of the order and stating that since they were obliged to charge certain minimum prices for coal, effective 12: 01 a. m., October 1, "it will be necessary for us to have assurance from you that any coal forwarded from our dock at Cincinnati on and after 12 a. m., October 1, will carry with it the minimum price as established by the Government and will be paid for by your Department based upon that price." The letter further stated that the Bituminous Coal Division had expressed the opinion that "after

the minimum prices become effective, any code member who offers for sale, sells, or delivers bituminous coal at prices less than the effective minimum prices applicable to such sale or delivery, whether the vendee is a private consumer, a state or municipality, or the Federal Government, would thereby violate the provisions of the Bituminous Coal Act and would become subject to revocation of code membership."

By letter of August 28, 1940 (attached to the stipulation herein as Exhibit No. 4 and made a part hereof by reference), the defendant's purchasing agent acknowledged receipt of the letter of August 16, 1940, and stated that by virtue of the Comptroller General's decision to the effect that payment for coal could not be made at other than the quoted price, all coal would have to be billed at the original quoted price throughout the contract period.

By letter of August 31, 1940 (attached to the stipulation as Exhibit No. 5 and made a part hereof by reference), to the defendant's purchasing agent, W. H. Warner & Co. stated that before any coal would be forwarded "it will be necessary for you to advise us that if and when minimum prices are established by the Bituminous Coal Division, Department of the Interior, any coal forwarded from our dock will be paid for on the basis of the then-established minimum price."

By letter of September 18, 1940, to the defendant's purchasing agent (attached to the stipulation herein as Exhibit No. 6 and made a part hereof by reference), W. H. Warner & Co. reiterated their statement that shipment could not be made until the matter of the price under the code had been definitely settled.

By letter of September 20, 1940, to W. H. Warner & Co. (attached to the stipulation herein as Exhibit No. 7 and made a part hereof by reference), the defendant's purchasing agent stated that there was a difference of opinion between the Bituminous Coal Division and the Comptroller General as to whether sales of coal to the Federal Government were subject to the Bituminous Coal Act. The letter further stated that—

> * * * obviously it is not the function of this Department to determine which version of the law is correct, and the specifications adopted by it to secure bids

for furnishing coal have been designed to supply the needs of the Department for coal in a manner which will not be violative of law, irrespective of what may be ultimately determined by the courts to be the law.

Accordingly, I regret to inform you that I cannot comply with your request, and the Department will expect strict compliance with the terms of its contract.

10. The first order for coal to be shipped under Purchase Order No. FB–1692 (finding No. 8) was given by the Cincinnati Post Office by letter dated October 30, 1940, addressed to W. H. Warner & Co., without adverting to the price, and the first shipment under the purchase order was on November 13, 1940. Thereafter other shipments were made on the purchase order, ending April 10, 1941, the total of all shipments aggregating 2,693.4 net tons.

11. All of the coal so shipped was invoiced at a price of $3.06 per net ton f. o. b. Trautman, Ohio, the total of the invoices for the 2,693.4 net tons amounting to $8,241.80. A statement showing each invoice number, the date thereof, the number of tons of coal covered thereby, and the amount thereof in money is attached to the stipulation herein as Exhibit No. 12 and made a part hereof by reference.

The local haul from Trautman to Cincinnati cost 28 cents a net ton, which, added to the invoice price of $3.06, gives a total of $3.34 per net ton. The price under the code herein involved for this coal for shipment to Cincinnati was $1.45 per net ton. The rail freight rate from the mines to Cincinnati was $1.89 per net ton. The sum of the two, $3.34, constituted the basis for the price of the coal shipped, as it was, ex-river.

12. The defendant's paying officers refused to honor the invoices of W. H. Warner & Co. at the code price and instead made payment at the price of $2.50 per net ton, which was accepted by the payee on account, with a statement that the deduction would be reported to the code authority. The amount paid was less by $1,508.30 than the amount which would have been due at the code price.

13. March 12, 1942, the Bituminous Coal Division of the Department of the Interior, in a communication to the attorney for plaintiff herein and intervenor, W. H. Warner & Co., after an analysis of the various routes and transporta-

tion charges entering into the problem of fixing the code price, ruled as follows:

> Upon these facts, the price of $3.06 per ton at Trautman, Ohio, is the proper ex-river price of coal delivered to the Trautman dock for shipment to the Post Office at Cincinnati, Ohio, via the team track and is the price at which W. H. Warner and Company, Inc., must invoice the U. S. Post Office in Cincinnati.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the Court:

The plaintiff is a producer of bituminous coal. On June 18, 1937, it became a member of the Bituminous Coal Code, which was created by the Bituminous Coal Act of 1937.[1] In May 1940 the Post Office Department issued invitations for bids for the use of the post office at Cincinnati, Ohio. Section 6 of schedule 2 of the specifications, hereinafter quoted, showed that the purchasing agent of the Post Office Department, who prepared the specifications, was in doubt as to whether the Act applied to sales of coal to the Government, as there had been no judicial determination of that question. In fact, no such determination has been made until now.

On May 31, 1940, the plaintiff, through its exclusive sales agent, submitted a bid of $2.50 per ton, f. o. b. dock, Trautman, Ohio. On August 8, the Director of the Bituminous Coal Division in the Department of the Interior, which Division had succeeded, under one of the reorganization orders, to the functions of the Bituminous Coal Commission under the Act, issued an order making prices and marketing rules effective September 3. On August 9 the Government accepted the plaintiff's bid. On August 14 the Director postponed the effective date of his August 8 order to October 1. Under the schedule of prices set by the Director, the minimum code price for the coal was $3.06 per ton. As we have said, the figure named in the plaintiff's bid was $2.50 per ton.

On August 13 the Post Office Department issued a purchase order to the plaintiff for 3,000 tons of coal, under the contract, to be shipped on the order of the Cincinnati post-

[1] 55 Stat. 134, 15 U. S. C. § 828, *et seq.*

master. The plaintiff acknowledged the order, stating that it must charge code prices for any coal which it shipped after those prices became effective. As we have said, the prices were to go into effect October 1. The purchasing agent of the Post Office Department replied that the Comptroller General had ruled that the quoted price of $2.50 per ton was the price the Department must pay throughout the contract period. The question was argued in further correspondence between the parties, some of which is referred to hereinafter.

The Director, on September 25, 1940, ruled that coal that was delivered after October 1, the effective date of the code prices, was subject to those prices, even though contracted for before that date. The postmaster at Cincinnati gave his first order for coal under the contract on October 30, and then and thereafter 2,963.4 tons were ordered by him and delivered by the plaintiff. The plaintiff billed the Government at the code price of $3.06 per ton, but the Government paid only $2.50 per ton. The plaintiff accepted the lesser payment "on account," and, after formal claim and the denial thereof by both the Post Office Department and the Comptroller General, this suit is brought for the difference of $1,508.30.

The plaintiff urges that the claim which this suit seeks to enforce (1) arises out of a contract with the United States, (2) is founded upon a law of Congress, the Bituminous Coal Act, and (3) is founded upon a regulation of an Executive Department, the Department of the Interior, made through the Bituminous Coal Division in that Department, and approved by the Secretary of the Interior. If any one of these contentions is correct, the court has jurisdiction.[2]

The Government denies our jurisdiction, asserting (1) that there was no contract, either express or implied in fact, which was in accord with the plaintiff's claim, and that even if a private person in the Government's circumstances would have been bound by a contract implied in law to pay the code price, we do not have jurisdiction of such nonconsentual contractual claims; (2) that no right in the plaintiff can be based upon the Bituminous Coal Act, or any regulation issued

[2] 28 U. S. C. § 250.

pursuant to it, because (a) the act has no application to sales to the Government; and (b) even if it does apply to sales to the Government as well as others, it imposes no duty upon the Government, or any other buyer, to pay the code price, since it is aimed only at the conduct of the seller.

We consider first whether there was a contract, express or implied in fact, that the Government would pay the code price if it was judicially determined, after the contract was awarded, that the minimum prices under the Bituminous Coal Act of 1937 were applicable to contracts for furnishing coal to the United States Government. Our inquiry is as to the intention of the parties. The invitation for bids, in Article 6 of Schedule 2, contained the following language:

> If on the date of opening of bids there has been no judicial determination that the minimum prices under the Bituminous Coal Act of 1937 are applicable to contracts for furnishing coal to the United States Government, contract will be awarded the lowest responsible bidder conforming to the specifications. However, if before award is made there shall have been judicial determination that minimum prices apply to contracts for the furnishing of coal to the United States Government, the right is reserved to accept the lowest responsible bid conforming to specifications and substitute the minimum prices established by the Bituminous Coal Division, provided the bidder's price is less than the minimum fixed; or to reject all bids and readvertise.

The Government contends that this language negatives any intention that the code price, rather than the bid price, would be paid for the coal in the event which actually occurred, which was that no judicial determination had been made, at the date of the opening of bids, as to whether or not the Bituminous Coal Act was applicable to the transaction. A literal reading of this paragraph gives some plausibility to this contention. But when all the implications of such a construction are considered, it seems unlikely indeed that the Government's agents who wrote the invitation for bids which became a part of the contract could have intended, by the language they used, what the Government now claims they intended.

The paragraph quoted shows an intention to scrupulously obey the law, in the making of the contract, if by the time of the making they had learned what the law was. The lan-

guage used gives no indication that they had prejudged the legal issues. It gives no hint of the grounds of defense which the Government relies on in this suit. The idea advanced here that even if the law were to be held applicable to sales to the Government, yet the Government could, with impunity, buy below the code price since the code price would be binding only on the seller, is indeed negatived by the language quoted. It says that the Government will pay the code price if it is determined that the minimum prices "are applicable to contracts for furnishing coal to the United States." It does not quibble about whether it is determined that, though the contractor is forbidden to sell, the United States is not forbidden to buy, or both are forbidden to engage in a sale and purchase at prices below the minimum.

So we have an intent, expressed in words, that if the parties know what the law is when they sign their contract, they will conform the contract to the law. We are urged to find that the same parties intended that if the revelation of the law should come to them a day or a month or a year after the contract was signed and if the revelation was that the law was applicable to their transaction, they would, nevertheless, openly flout the law. We can imagine no rational basis for such an intent. For the contractor, it would have been contemplation of business suicide, since it would have exposed him to expulsion from code membership and to the prohibitive tax on nonmembers. For the agents of the Government, it would have meant that they and their Government would be, at the least, accessories to a violation of the law made by the Government. They would not have been putting themselves and their Government in this dishonorable position in order to save some dollars for the Government, since they had expressed complete willingness to pay the code minimum, even though it was higher than the low bid, if the answer to the legal question came by the time the bids were opened.

We think that the problem of the applicability or nonapplicability of the Bituminous Coal Act to sales to the Government made it difficult to draft invitations to bid which would cover the situation that might be presented when that doubt was resolved; that the Government agents who wrote the proposed contract were used to merely issuing a stereo-

typed form of proposal; that they could hardly imagine a contract which, after it was signed, would still contain, on its face, an unresolved question as to what the price would be; and that therefore they wrote the invitation so that, on its face, it would leave the price in doubt only down to the day of the opening of the bids. But, as we have said, we think they did not mean thereby to bind themselves or the contractor to violate the law if they learned the law after the bids were opened. Language which, taken literally, may seem to have a plain meaning may be made ambiguous by the fact that that apparent plain meaning could hardly have been the meaning intended by rational persons, whose attitude to the situation, taken as a whole, belies the apparent plain meaning.

The intent of the Government not to participate in, or induce, a breach of its own laws if the proper interpretation of its laws should be determined before the contract was made, was shown, as we have seen, by the words of the invitation. We think that the circumstances, and the statements made by the agents of the Post Office Department, after the contract was signed, show that their intent, as to the meaning of the contract after its execution, was not different. The letter of August 28, 1940, referred to in finding 9, from the Department's purchasing agent to the plaintiff, stated that by virtue of the Comptroller General's decision to the effect that payment for coal could not be made at other than the quoted price, all coal had to be billed at the original quoted price throughout the contract period. The letter of September 20, 1940, also referred to in finding 9, from the Department's purchasing agent to the plaintiff's sales agent said that there was a difference of opinion between the Bituminous Coal Division and the Comptroller General as to whether sales of coal to the Federal Government were subject to the Act. It further said:

> * * * obviously it is not the function of this Department to determine which version of the law is correct, and the specifications adopted by it to secure bids for furnishing coal have been designed to supply the needs of the Department for coal in a manner which will not be violative of law, irrespective of what may be ultimately determined by the courts to be the law.

> Accordingly, I regret to inform you that I cannot comply with your request, and the Department will expect strict compliance with the terms of its contract.

The statements in this letter show that the purchasing agent for the Post Office Department, when he drew the contract, intended to arrange for the needed supply of coal, and to pay the code price for it if it should be "ultimately determined by the courts to be the law" that the Bituminous Coal Act was applicable. There was no suggestion that, regardless of the law, the letter of the contract was to govern the price. It was natural that the purchasing agent should follow the Comptroller General's ruling rather than that of the Bituminous Coal Division, in the absence of a court decision, since the former official had the power to disapprove the Department's accounts, while the Division had no means of bringing pressure to bear. But the language of the letter shows that, if a court decision holding that the code prices were applicable to sales to the Government had been made while the coal was still being delivered under the contract, the purchasing agent would have expected to pay the code price for the coal furnished under the contract. The Comptroller General's view as to the legal effect of the contract, which view was the basis for the Department's refusal to pay the code price, is of no assistance to us in determining what the parties meant by the contract, since that official had no part in its making.

We conclude, therefore, that the contract, interpreted according to the intent of the parties, meant that the Government would pay the minimum code prices if it should be determined that those prices were made applicable by the Bituminous Coal Act to purchases of coal by the Government. We now consider whether the Act did apply. The Government denies that it did and relies principally upon the doctrine which is stated in a standard treatise as follows:[3]

> General words in a statute do not include nor bind the government by whose authority the statute was enacted, where its sovereignty, rights, prerogatives, or interests are involved. It is bound only by being expressly named or by necessary implication from the terms and purpose of the act.

[3] Black, Construction and Interpretation of the Laws, 2nd Ed., 94.

The most commonly quoted judicial statement of the doctrine is that of Mr. Justice Clifford in *United States* v. *Herron*, 20 Wall. 251, 255:

> Where an act of Parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words.

The decision in the *Herron* case was that a discharge in bankruptcy did not bar a suit by the United States against the bankrupt, who was surety on the bond of a public official. A recent consideration of the doctrine is in *Nardone* v. *United States*, 302 U. S. 379, the wire-tapping case. The two statements of doctrine above quoted are both sufficiently indefinite to leave much room for discussion as to whether the doctrine applies to any particular situation, such as the one presented by this case.

The Bituminous Coal Act was enacted to relieve a chronically depressed, though large and essential, industry. Both proprietors and laborers, and numerous dependent communities, were the victims of this condition. The preamble of the Act[4] says:

> Regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom.

The "injury and wrong" which the Act was intended to prevent was the unrestrained competition which had driven down the price of coal. The Government had, along with other buyers of coal, profited, in its contracts for its supply

[4] 15 U. S. C. § 828.

of coal, by this competition, by receiving low bids. Counsel for the Government urge that Congress, in enacting the Act, intended to retain this advantage to the Government as a purchaser of coal and to relieve the depressed industry only by raising prices for other purchasers. We think that Congress could hardly have entertained such an intention. The Government, as sovereign, would have been in direct conflict with the Government, as user of coal. It would have been busy policing code operators to see that they observed code prices and conditions, and at the same time giving its own patronage to noncode operators, who, because they did not observe code conditions, could underbid the code members. It would have been herding coal operators into membership in the code by a prohibitive tax on sales by nonmembers to outsiders but at the same time encouraging nonmembership by permitting sales to itself free of the coercive tax.

In addition to these inherent inconsistencies which tend to indicate that the Government did not intend to except itself from the operation of its statute, there are indications on the face of the statute that it was intended to be applicable to sales to the Government. Section 3 (e), 15 U. S. C. § 830 (e), provided that the excise tax of one cent a ton imposed by Section 3 (a) should not apply in the case of a sale of coal for the exclusive use of the United States or a state or subdivision thereof for use in the performance of governmental functions. If the Act had not been intended to be, in general, applicable to the United States, there would have been no reason for this express provision for exemption. Section 9 (c) of the Act, 15 U. S. C. § 839 (c), gave to an employee of a producer of coal for the use of the United States the right to seek a hearing by the Commission as to whether certain of the labor standards of the Act were being complied with by the producer. This also is some indication that Congress had no intention to exempt producers of coal for sale to the United States from the operation of the Act. The fact that the Bituminous Coal Division, which was charged with the administration of the Act, interpreted it as intended to apply to sales to the Government is of some assistance in the construction of the Act.

We conclude, therefore, that the Act was applicable to sales of coal to the Government. We have construed the contract as obligating the Government to pay the minimum code price if the Act was applicable to the transaction. It follows that the plaintiff may recover the difference between the amount already received and the code price.

The plaintiff contends that even if the contract is construed as showing an intent to pay only $2.50 a ton for the coal, though a sale at that price was forbidden by the Act, and thus plaintiff could not recover under the terms of the contract, still it has a right to recover upon a claim founded upon a law of Congress, the Bituminous Coal Act. This contention amounts to an assertion that such a contract would be illegal, and that the plaintiff may recover the legal price, viz, the minimum code price, in spite of the contract. The Government makes the surprising answer to this contention that, in that situation, the law should leave the two participants in the wrongdoing where it finds them, with the plaintiff's coal in the Government's bin, partly unpaid for. When the doctrine, *in pari delicto*, was devised to enable courts to wash their hands of the distasteful function of compelling accountings such as those between highwaymen, its inventors could hardly have foreseen the day when a great government would invoke the doctrine in confession and avoidance of a claim founded upon its own laws. The plaintiff replies that it was not equally guilty, and that, even if it had been, code prices are like freight rates, which, because of the policy of nondiscrimination involved in their collection, the railroad can collect even in the face of an illegal contract to discriminate. In view of our interpretation of the contract, we need not examine these contentions further.

The plaintiff may recover $1,508.30.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

WILLIAM ROBERT HADLEY v. THE UNITED STATES

[No. 45987. Decided February 7, 1944]

On Demurrer

Suit for false imprisonment under the Act of May 24, 1938; petition does not contain necessary allegations under the Act.—In a suit for damages for false imprisonment, under the Act of May 24, 1938 (U. S. Code, Title 18, section 729) it is *held* that plaintiff's petition is fatally defective in that the petition does not allege, as required by the statute, that plaintiff did not commit the acts with which he was charged and that such acts did not constitute a crime against the State in which the acts were committed, and the petition is dismissed.

Same; requirements of statute.—Under the Act of May 24, 1938, one falsely convicted of committing a crime against the United States may not recover if the acts charged against him constituted a crime against the State in which the acts were committed.

Mr. William Robert Hadley, pro se.

Mr. Clay R. Apple, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues under the Act of May 24, 1938,[1] for damages for unlawful imprisonment in the penitentiary at Leavenworth, Kansas. He alleges he was indicted for having entered a national bank at Amarillo, Texas, with the intent of passing on said bank a forged check for $323.00. He pleaded guilty to the indictment and was sentenced to the penitentiary for 10 years.

He had served more than a year of this sentence, when the Supreme Court delivered its opinion in the case of *Jerome* v. *United States*, 318 U. S. 101. In this case it was held that the entry into a national bank for the purpose of committing a felony against the laws of the State in which

[1] C. 266, sec. 1, 52 Stat. 438; Title 18, U. S. C. sec. 729.

the bank was located did not come within the terms of section 2 (a) of the Bank Robbery Act,[2] under which plaintiff was convicted. It was held that the entry into the bank must have been for the purpose of committing a crime made a felony under the Federal statutes. After this decision plaintiff filed a petition for habeas corpus in the District Court for the District of Kansas. That court held that plaintiff had been unlawfully convicted, in view of the decision in the *Jerome* case, and ordered his release. Plaintiff sues for damages for his imprisonment under such unlawful conviction.

The defendant demurs because it says the petition fails to allege:

(a) That there was an "appeal," a "new trial," a "rehearing" or a "pardon" "on the ground of innocence."
(b) That plaintiff "did not commit any of the acts with which he was charged."
(c) That such "charge did not constitute a crime or offense against * * * any State."
(d) That plaintiff "has not, either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction."

We do not need to decide whether plaintiff's release under habeas corpus brings him within the provisions of the Act of May 24, 1938,[3] because it is clear that plaintiff's petition is fatally defective in that it does not allege that plaintiff did not commit the acts with which he was charged and that such

[2] 48 Stat. 783; 50 Stat. 749; Title 12 U. S. C. 588 (b).

[3] This act reads: That any person, who, having been convicted of any crime or offense against the United States and having been sentenced to imprisonment and having served all or any part of his sentence, shall hereafter, on appeal or on a new trial, or rehearing, be found not guilty of the crime of which he was convicted or shall hereafter receive a pardon on the ground of innocence, if it shall appear that such person did not commit any of the acts with which he was charged or that his conduct in connection with such charge did not constitute a crime or offense against the United States, or any State, Territory, or possession of the United States or the District of Columbia, in which the offense or acts are alleged to have been committed, and that he has not, either intentionally, or by willful misconduct, or negligence, contributed to bring about his arrest or conviction, may, subject to the limitations and conditions hereinafter stated, and in accordance with the provisions of the Judicial Code, maintain suit against the United States in the Court of Claims for damages sustained by him as a result of such conviction and imprisonment. [May 24, 1938, c. 266, sec. 1, 52 Stat. 438; Title 18, U. S. C. sec. 729.]

acts did not constitute a crime against the State in which the acts were committed. This is a necessary allegation. The Act gives a prisoner a right of action against the United States only "if it shall appear that such person did not commit any of the acts with which he was charged or that his conduct in connection with such charge did not constitute a crime or offense against the United States or any State, Territory, or possession of the United States or the District of Columbia, in which the offense or acts are alleged to have been committed * * *." Although plaintiff may not have committed a crime against the United States, still he is not entitled to recover under the Act if the acts charged against him constituted a crime against the State in which the acts were committed.

Plaintiff does not allege in his petition that the entering into a national bank with the intent of passing a forged check, for which he was convicted, did not constitute a crime against the State of Texas, nor that he did not commit such acts. These are necessary allegations. Since the petition fails to allege them, the demurrer must be sustained and the petition dismissed. It is so ordered.

MADDEN, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Judge*; and WHALEY, *Chief Justice*, took no part in the decision of this case.

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY v. THE UNITED STATES

[Congressional No. 17765. Decided February 7, 1944]

On the Proofs

Compensation for work and services in connection with construction of Navy fuel oil station at Pearl Harbor, Hawaii.—In a report to the Senate in accordance with Senate Resolution No. 84, introduced March 10, 1941, with reference to (S. 905) "A Bill for the relief of the Pan American Petroleum and Transport Company", it is *held:*

1. The plaintiff has no claim against the United States either at law or in equity.

Opinion of the Court

2. The United States has received and retains the benefit of the work done and the materials furnished and if it were a private person it would have been obliged to pay the value thereof to plaintiff as a condition to the relief granted. Such an obligation does not rest on the United States because the fraud committed not only involved pecuniary loss to the United States, and the corruption of its public officials, but was in defiance of the laws of Congress and resulted in the defeat of the declared policy of Congress concerning the national safety. (See Pan American Petroleum & Transport Co., et al. v. United (See *Pan American Petroleum & Transport Co., et al. v. United States*, 273 U. S. 456.) It is for Congress only to say whether stored to the ***status quo ante***.

Mr. Ethelbert Warfield for the plaintiff. *Messrs. Robert W. Woolley*, *Ernest W. Stephens*, *William J. Bulow, Jr.*, and *Satterlee & Warfield* were on the briefs.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Mr. Joseph M. Friedman* was on the briefs.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

On February 18, 1941, a bill was introduced in the Senate directing the Secretary of the Treasury to pay to the Pan American Petroleum & Transport Company the sum of $9,336,956.58 as compensation for work and services rendered and material furnished by this company in connection with the construction of the naval fuel oil station at Pearl Harbor, Hawaii, and as compensation for the fuel oil and other petroleum products delivered by said company to the United States at said station in conformity with two contracts, one dated April 25, 1922, and the other dated December 11, 1922. This bill was referred to this court "in pursuance of the provisions of an Act entitled, 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911," known as the Judicial Code.

Section 151 of that Code authorizes reference to this court by either House of Congress of a bill pending before it for a report on the facts in the case and the amount justly due. In addition to making a report on the facts, the duty is also imposed on the court of reporting whether or not

there has been delay or laches in presenting the claim or whether or not it is barred by the statute of limitations, and to make such conclusions "as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant."

After the passage of the Resolution referring to this court the bill "for the relief of the Pan American Petroleum and Transport Company," that company filed a petition in this court setting up its claim. A general traverse was filed by the United States and the case was referred to a commissioner of the court to report on the facts.

All of the testimony introduced was embodied in a stipulation entered into between the parties, to which was attached numerous exhibits. The stipulation, however, was entered into, subject to the right in both parties to object to any of the facts stipulated "on the grounds of irrelevancy or immateriality, or both," and the only issue between the parties is the question of what facts are relevant and material to the question presented by the bill "for the relief of the Pan American Petroleum and Transport Company."

The plaintiff says that the only relevant and material facts are whether or not it constructed the naval fuel oil station at Pearl Harbor, and whether it delivered the fuel oil and other petroleum products as claimed, and whether or not the United States received the benefit of the work done and materials furnished and used them, and, lastly, whether or not the amount claimed for the work done and materials furnished is fair and equitable. This position, however, is clearly untenable in the light of the decision of the Supreme Court in the case of *Pan American Petroleum & Transport Co., et al* v. *United States*, 273 U. S. 456. Briefly stated, that case is as follows:

Not long before completion of the construction of the naval fuel oil station at Pearl Harbor, Congress passed a joint resolution on February 8, 1924, reciting that the contracts of April 25, 1922, and of December 11, 1922, and the leases executed in pursuance of the contracts, had been executed

under circumstances indicating fraud and corruption and without authority on the part of the officers purporting to act for the United States, and in defiance of the settled policy of the Government to maintain in the ground a great reserve of oil adequate to the needs of the Navy; and the Act authorized and directed the President to cause suit to be prosecuted for the annulment and cancellation of all such leases and contracts.

In obedience thereto, a bill was filed in the District Court for the Southern District of California. The District Court entered a decree in accordance with the prayer of the bill and stated an account between the parties. This account, summarily stated, charged the Transport Company and the Petroleum Company, its subsidiary, with all the oil taken from the leased ground and credited these two companies with the cost of the erection of the storage facilities at Pearl Harbor and the oil delivered thereto, and the cost of drilling wells on the leased ground.

On appeal by both parties to the Circuit Court of Appeals this decree was reversed insofar as it gave the two companies credit for the expenditures they had made.

The Supreme Court granted certiorari, and affirmed the decision of the Circuit Court of Appeals. The Supreme Court first held that the contracts and leases had been entered into as the result of fraud and corruption and without authority of law and contrary to the declared purpose of Congress. It then proceeded to consider whether or not the companies were entitled to credit for the expenditures that they had made in constructing the naval oil depot at Hawaii and in drilling wells, etc. The Supreme Court held that they were not entitled to this credit because, it said, "the contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption, and fraud." (p. 509.)

The court recognized the rule that he who seeks equity must do equity requires a person defrauded to return, or offer to return, whatever of value he may have received as a result of the transaction, as a condition precedent to his

right to relief from the fraudulent transaction; but it held that this rule did not apply to the United States in such a case as was before it. The court said:

> The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. Its position is not that of a mere seller or lessor of land. The financial element in the transaction is not the sole or principal thing involved. This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them or the value to the Government of the improvements made or fuel oil furnished as all were done without authority and as means to circumvent the law and wrongfully to obtain the leases in question. * * * [p. 509.]

The court then proceeded to say that it was "not for the courts to decide whether any of these things are needed or should be retained or used by the United States." "Such questions," it said, "are for the determination of Congress. It would be unjust to require the United States to account for them until Congress acts; and petitioners must abide its judgment in respect of the compensation, if any, to be made."

It is apparent from the above quotations from the opinion of the Supreme Court that Congress should have before it all the facts relevant to the entire transaction, as a result of which the work was done and the materials were furnished, in order that it may arrive at an intelligent judgment as to whether or not the facts and circumstances transcend the ordinary considerations of equity and entitle plaintiff to relief notwithstanding its wrongdoing. With this guide in mind, the court makes the following

FINDINGS OF FACT

(For the convenience of the Congress, we incorporate in the following findings certain things not ordinarily incorporated in judicial findings of fact, such as Acts of Congress and court decisions.)

1. On February 18, 1941, the following bill was introduced in the Senate of the United States:

A BILL

For the relief of the Pan American Petroleum and Transport Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the Pan American Petroleum and Transport Company the sum of $9,336,956.58, as compensation for work and services rendered and material furnished by the Pan American Petroleum and Transport Company for and in connection with the construction of the naval fuel oil station at Pearl Harbor, Territory of Hawaii, and compensation for the fuel oil and other petroleum products delivered by the Pan American Petroleum and Transport Company, to the United States of America at such station, in conformity with a contract dated April 25, 1922, supplemented by a contract dated December 11, 1922.

2. This bill was referred to this court under a Resolution* introduced in the Senate on March 10, 1941, reading as follows:

Resolved, That the bill (S. 905) entitled "A bill for the relief of the Pan American Petroleum and Transport Company", now pending in the Senate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911; and the said court shall proceed with the same in accordance with the provisions of such Act and report to the Senate in accordance therewith.

3. Section 151 of the Judicial Code (Title 28 U. S. C., section 257), reads as follows:

Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House

*Congressional Record, 77th Congress, first session, page 2116.

in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court. [March 3, 1911, c. 231, § 151, 36 Stat. 1138.]

4. All the testimony introduced in this court is incorporated in a stipulation of facts entered into between the parties and filed on October 20, 1942. To this stipulation are attached exhibits A to R, both inclusive, and it incorporates by reference exhibits to plaintiff's petition, Nos. 1 to 4, both inclusive. Paragraph 10 of the stipulation reads as follows:

> A true copy of the opinion of the Supreme Court of the United States in the matter of *United States* v. *Pan American Petroleum & Transport Company and Pan American Petroleum Company* (273 U. S. 456) is attached hereto, marked "Exhibit I," and made a part hereof. Each and all of the facts set out in said Exhibit I hereto are, as provided above in this stipulation, made a part of the record in this case; and each and all statements of fact and determinations of questions of law contained in said Exhibit I hereto, insofar as the same may here be applicable, are hereby conceded to be *res judicata* in this case.

In view of this stipulation the following findings will be taken from the opinion of the Supreme Court insofar as possible, and where so taken they will be in quotations, with the reference to the page in the Supreme Court's opinion where they are found.

5. The plaintiff, at all times mentioned in its petition, was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office for the transaction of business in the City of New York and State of New York. It will hereafter be called the "Transport Company." It owned all the stock in the Pan American Petroleum Company, hereinafter called the "Petroleum Company."

During the entire period of the negotiations and execution of the contracts and leases hereinafter referred to, Edward L. Doheny controlled both companies. Until July 24, 1922, he was President of the Petroleum Company, but on that date became Chairman of its Board of Directors. Until December 7, 1923 he was President of the Transport Company, but on that date became Chairman of its Board of Directors.

6. On April 25, 1922, the plaintiff entered into a contract with the United States, signed by the Acting Secretary of the Interior and by the Secretary of the Navy providing for the construction of the storage facilities at Pearl Harbor and for the delivery to such storage facilities of 1,500,000 barrels of fuel oil. Later, a supplementary contract was entered into on December 11, 1922, signed for the United States by the Secretary of the Interior and the Secretary of the Navy, providing for the construction of additional storage facilities at Pearl Harbor and for the furnishing of additional fuel oil. It was under the first of these two contracts that the storage facilities were constructed and the oil was delivered, for which payment is now being requested.

The contract of April 25, 1922, called for payment for the work to be done and the oil to be furnished out of royalty oil to be obtained by the United States under leases to be given on lands located in Naval Petroleum Reserve No. 1, hereinafter mentioned. However, the contract did not obli-

gate the United States to give such leases to the plaintiff; nevertheless, plaintiff's proposal to construct the facilities and to furnish the oil was conditioned upon a preferential right to all oil leases which might thereafter be made by the Government in Naval Petroleum Reserve No. 1, and it insisted on such assurances. But instead of incorporating such a provision in the contract of April 25, 1922, it was agreed that a letter should be written by the Assistant Secretary of the Interior and the Secretary of the Navy to the plaintiff stating that the Department of the Interior had agreed to grant to the plaintiff within one year from the date of the delivery of the contract leases on two strips of land requested by plaintiff totalling 300 acres. Such a letter was written and such a lease was executed on June 5, 1922.

Later, and coincident with the signing of the contract of December 11, 1922, another lease was given the plaintiff covering the balance of the unleased lands in Naval Petroleum Reserve No. 1.

7. By the terms of the contract dated April 25, 1922, as stated by the Supreme Court in the above-mentioned decision, on pages 488–489, "the Transport Company agreed to furnish at the Naval Station at Pearl Harbor, Hawaii, 1,500,000 barrels of fuel oil and deliver it into storage facilities there to be constructed by the company according to specifications of the Navy. The Company was to receive its compensation in crude oil to be taken from the Reserves. The quantity, on the basis of the posted field prices of crude oil prevailing during the life of the contract, was to be the equivalent of the market value of the fuel oil and also sufficient to cover the cost of the storage facilities. The United States agreed to deliver to the company at the place of production month by month all the royalty oil furnished by lessees in Reserve Nos. 1 and 2 until all claims under the contract were satisfied. It was stipulated that if production of crude oil should decrease so as unduly to prolong performance, 'then the Government will, in the discretion of the Secretary of the Interior, grant additional leases on such lands as he may designate in naval petroleum reserve No. 1 as shall be sufficient to maintain total deliveries of

royalty oil under this contract at the approximate rate of five hundred thousand barrels (500,000) per annum.' And, by Article XI of the contract, it was agreed that, if during the life of the contract such additional leases should be granted within specified area, 'the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance * * * the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree * * * then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding.'"

8. "The lease of June 5, 1922, was signed by the Assistant Secretary of the Interior. It was made in accordance with a letter of April 25, 1922, signed by the Acting Secretary of the Interior and the Secretary of the Navy, and sent to J. J. Cotter, who was Vice-President of the Transport Company. It covered the quarter section described in the letter. This lease was assigned to the Petroleum Company." (p. 489)

9. "The contract dated December 11, 1922, is signed for the United States by the Secretary of the Interior and the Secretary of the Navy. It declares that it is desired to fill storage tanks at Pearl Harbor promptly as they are completed and also to procure additional fuel oil and other petroleum products in storage there and elsewhere; that the Secretary of the Navy requested the Secretary of the Interior as administrator of the Naval Petroleum Reserves to arrange for such products in storage and to exchange therefor additional royalty crude oil, 'the probable cost of the additional products and storage immediately planned for being estimated at fifteen million dollars more or less'; that this cannot be done on the basis of exchange for the crude oil coming to the Government under the present leases; that, under the contract of April 25, 1922, the company is granted preferential right to leases to certain lands in Naval Reserve No. 1; and that the company was planning to provide refinery

facilities at Los Angeles, together with pipe lines from the field to the refinery and docks, and to erect storage having capacity of 2,000,000 barrels or more. The company agreed to furnish, as directed by the Secretary of the Interior, the fuel oil in storage at Pearl Harbor covered by the earlier contract; to construct for actual cost additional storage facilities there, as required, up to 2,700,000 barrels; to furnish fuel oil and other petroleum products in the proposed storage as and when completed on the basis of market prices plus transportation cost at going rates; to furnish without charge, until expiration of the contract, storage for 1,000,000 barrels of fuel oil at Los Angeles; to fill it with fuel oil for the Navy at such time as Government royalty oil should be available for exchange, and to bunker Government ships from such oil at cost; to maintain for 15 years subject to the demands of the Navy 3,000,000 barrels of fuel oil in the company's depots at Atlantic Coast points; to furnish crude oil products and storage facilities at other points, designated by the Government, when sufficient crude oil has been delivered to satisfy the Pearl Harbor contract; to sell the Navy at ten percent less than market price additional available fuel oil produced from the reserves and manufactured products from its California refineries; to credit the Navy for crude oil at published prices and for gas and casinghead gasoline at prices fixed in the leases, and to satisfy any surplus credits of the Government by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or by payment in cash as the Government might elect. The United States agreed to deliver to the company in exchange all royalty oil, gas, and casinghead gasoline produced on Reserves Nos. 1 and 2 until its obligations were discharged and in any event for fifteen years after the expiration of the contract of April 25, 1922 [which was without specified time limit], and to lease to the company all the unleased lands in Reserve No. 1." (pp. 489–491.)

10. "The lease of December 11, 1922, is signed for the United States by the Secretary of the Interior and the Secretary of the Navy. It covers all unleased lands in Reserve No. 1, but with a provision that no drilling shall be done on

approximately the western half without the lessor's consent. It runs for twenty years and so long thereafter as oil or gas is produced in paying quantities. The royalties range from 12½ to 35 per cent." (p. 491)

These contracts and leases were executed in the face of the declared policy of Congress, set out in the following three findings, as stated in the decision of the Supreme Court in *Pan American Co. et al* v. *United States*, *supra*.

11. "Under R. S. sections 2319, 2329, and the Act of February 11, 1897, c. 216, 29 Stat. 526, public lands containing oil were open to settlement, exploration and purchase. Exploration and location were permitted without charge, and title could be obtained for a nominal amount. * * * Prior to the autumn of 1909 large areas of public land in California were explored; petroleum was found, patents were obtained, and large quantities of oil were taken. In September of that year, the director of the Geological Survey reported that, at the rate oil lands in California were being patented, all would be taken within a few months, and that, in view of the increased use of fuel oil by the Navy, there appeared to be immediate need for conservation. Then the President, without specific authorization of Congress, by proclamation withdrew from disposition in any manner specified areas of public lands in California and Wyoming amounting to 3,041,000 acres. By the Act of June 25, 1910, c. 421 (36 Stat. 847), Congress expressly authorized the President to withdraw public lands containing oil, gas and other minerals. An executive order of July 2, 1910, confirmed the withdrawals then in force. By a later order, September 2, 1912, the President directed that some of these lands "constitute Naval Petroleum Reserve No. 1 and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by Act of Congress." (pp. 486–487.) This reserve includes all the lands involved in the leases above mentioned. By a similar order, dated December 13, 1912, the President created Naval Petroleum Reserve No. 2.

12. "The Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, regulates the exploration and mining of public lands,

and authorizes the Secretary of the Interior to grant permits for exploration and make leases covering oil and gas lands, exclusive of those withdrawn or reserved for military or naval purposes. The Act of June 4, 1920, c. 228, 41 Stat. 812, 813, appropriated $30,000 to be used, among other things, for investigating fuel for the Navy and the availability of the supply allowed by naval reserves in the public domain. It contains the following: '*Provided*, That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves * * * to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: * * * *And provided further*, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed $500,-000, are hereby made available for this purpose until July 1, 1922: *Provided further*, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.'" (pp. 487–488.)

13. Under the Act of August 31, 1842 (5 Stat. 577; R. S. § 1552), the Secretary was authorized to construct fuel oil depots, but such authority was taken away from him by the Act of March 4, 1913 (37 Stat. 898). Since that time Congress has made separate appropriations for fuel oil stations at places specifically named.[1] "And," as said by the Supreme Court on page 501 of the above mentioned opinion, "it has long been its policy to prohibit the making of contracts of purchase or for construction work in the absence of express

[1] March 4, 1913, c. 148, 37 Stat. 891, 898; June 30, 1914, c. 130, 38 Stat. 392, 401; March 3, 1915, c. 83, 38 Stat. 928, 937; August 29, 1916, c. 417, 39 Stat. 556, 570; March 4, 1917, c. 180, 39 Stat. 1168, 1179; June 15, 1917, c. 29, 40 Stat. 182, 207; July 1, 1918, c. 114, 40 Stat. 704, 726; November 4, 1918, c. 201, 40 Stat. 1020, 1034; July 11, 1919, c. 9, 41 Stat. 131, 145; June 5, 1920, c. 253, 41 Stat. 1015, 1030; July 12, 1921, c. 44, 42 Stat. 122, 130.

authority and adequate appropriations therefor. R. S. secs. 3732, 3733; Act of June 12, 1906, 34 Stat. 255; Act of June 30, 1906, 34 Stat. 764." Prior to the execution of the contracts above referred to the Department had tried to secure additional appropriations for the Pearl Harbor storage facilities, but Congress had refused to make them.

The contract of April 25, 1922, as stated, called for payment for the construction of these storage facilities out of royalty oil to be secured from the execution of leases on lands in naval petroleum reserves, but, as stated by the Supreme Court: "The Secretary was not authorized to use money received from the sale of gas products. All such sums are required to be paid into the Treasury. R. S. secs. 3617, 3618, as amended, 19 Stat. 249" (p. 502).

14. "March 5, 1921, Edwin Denby became Secretary of the Navy and Albert B. Fall, Secretary of the Interior. May 31, 1921, the President promulgated an executive order purporting to commit the administration and conservation of all oil and gas bearing lands in the Reserves to the Secretary of the Interior, subject to the supervision of the President" (p. 488).

15. "A Joint Resolution adopted by the Senate and House of Representatives and approved by the President, February 8, 1924, 43 Stat. 5, stated that it appeared from evidence taken by the Committee on Public Lands and Surveys of the Senate that the contract of April 25, 1922, and the lease of December 11, 1922, were executed under circumstances indicating fraud and corruption, without authority on the part of the officers purporting to act for the United States and in defiance of the settled policy of the Government to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy. It declared the contracts and leases to be against public interest and that the lands should be recovered and held for the purposes to which they were dedicated. And it authorized and directed the President to cause suit to be prosecuted for the annulment and cancellation of the lease and all contracts incidental and supplementary thereto, and to prosecute such other action or

proceedings, civil and criminal, as might be warranted" (pp. 491–492).

16. Pursuant to this resolution, the President appointed the Honorable Owen J. Roberts and the Honorable Atlee Pomerene as special counsel for the United States, who, under the authority conferred upon them, instituted suit on March 17, 1924, against the plaintiff herein and its subsidiary, the Petroleum Company, in the District Court for the Southern District of California, for the recovery of the lands described in the leases dated June 5 and December 11, 1922, for the cancellation of the said leases and the two contracts dated April 25 and December 11, 1922, and for an accounting. The opinion of the District Court was handed down May 28, 1925 (6 F. (2d) 43). The court entered its decree on July 11, 1925. The court cancelled the leases and contracts on the ground that they were consummated between Fall and Doheny by conspiracy, corruption, and fraud, and on the further ground that the contracts and leases were not authorized by law. The court in the decree ordered the Transport Company to deliver to the United States the contracts of April 25 and December 11, 1922, and the Petroleum Company to deliver to the United States the leases of June 5 and December 11, 1922—all of the foregoing to be cancelled.

The court in the decree made an accounting as follows:

I. THE TRANSPORT COMPANY

The Transport Company was debited with—	
1. All royalty oil delivered under the two contracts	$7,889,759.21
2. Profit on resale of royalty oil	791,012.03
3. Interest on the foregoing items	778,976.91
Total	9,459,748.15
The Transport Company was credited with—	
1. Actual cost of storage facilities at Pearl Harbor	7,350,814.11
2. Actual cost of fuel oil delivered in said facilities	1,986,142.47
3. Interest on the foregoing items	1,080,491.54
Total	10,417,448.12
Balance due the Transport Company	957,699.97

II. THE PETROLEUM COMPANY

The Petroleum Company was debited with—	
1. Value of oil (not including above) taken under the two leases	$1,556,861.17
2. Interest on above item	170,650.02
Total	1,727,511.19
The Petroleum Company was credited with—	
1. Actual expenditures in drilling, making useful improvements, etc., to property under the leases	1,013,428.75
2. Other actual expenditures on said property	194,991.01
3. Interest on the foregoing items	161,060.43
Total	1,369,480.19
Balance due the United States	358,031.00

The court in the decree directed the receivers, who were appointed to take charge of the properties at the time the suit was instituted, to pay to the Transport Company the sum of $957,699.97, with interest. The court directed the Petroleum Company to pay to the United States the sum of $358,031.00, with interest.

17. The District Court found the following facts, as stated in abridged form by the Supreme Court in the above mentioned case:

"(a) E. L. Doheny controlled both companies. Fall was active in procuring the transfer of the administration of naval petroleum reserves from the Navy Department to the Interior. And, after the executive order was made, he dominated the negotiations that eventuated in the contracts and leases. From the inception no matter of policy or action of importance was determined without his consent. Denby was passive throughout, and signed the contracts and lease and the letter of April 25, 1922, under misapprehension and without full knowledge of their contents. July 8, 1921, Fall wrote Doheny: 'There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred

with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his Department, but only with himself, and such consultation will be confined strictly and entirely to matters of general policy.' After that Doheny and his companies acted upon the belief that Fall had authority to make the contracts and leases. Doheny and Fall conferred as to a proposal to be made by the Transport Company whereby it should receive from the United States royalty oil for constructing storage facilities at Pearl Harbor and filling them with fuel oil. They discussed the matter of granting other leases in Reserve No. 1. They also discussed a petition of the Petroleum Company for reduction of royalties under an existing lease. Fall and Admiral John K. Robison, personal representative of the Secretary of the Navy in naval reserve matters, agreed that the proposed contract should be kept secret so that Congress and the public should not know what was being done. [But it is to be said that Robison's motives in this were not the same as Fall's.]" (pp. 492–493)

(b) "November 28, 1921, Doheny submitted to Fall a proposal stating that, in accordance with a suggestion from Fall, he had made inquiries as to cost of constructing storage for 1,500,000 barrels of fuel oil at Pearl Harbor. He gave in detail figures relating to such cost, the price of crude oil in the field and of fuel oil at Pearl Harbor, and stated the total amount of crude oil necessary to pay for the tanks and fuel oil 'on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserves and to be leased to us.' The letter concluded: 'I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent, I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.' And the next day Fall wrote Robison: 'Mr. Cotter will wait upon you with data, etc., with relation to oil tanks and royalty oils in connection with Pearl Harbor demands. I have asked him also to hand you, for your inspection, the original of a letter from Colonel

Doheny addressed to myself, containing a résumé of the data. Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.' The letter stated that the gas pressure was lessening and that the companies were suffering loss in the payment of the 55 percent royalty. 'If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient.'" (pp. 493–494)

(c) "Doheny had agreed to advance $100,000 to Fall as and when he should need it. November 30, at Fall's request, Doheny sent him $100,000 in currency. The money was obtained in New York on the check of Doheny's son who carried it to Washington and gave it to Fall. And Fall sent to Doheny by the son a demand note for $100,000. No entry of the advance was made in the accounts of Doheny or the petitioners. Nothing has been paid on account of principal or interest. At that time it was understood between Doheny and Fall that the latter need not repay it in kind. Doheny intended, if Fall did not dispose of a certain ranch in New Mexico, to cause the Transport Company to employ him at a salary sufficient to enable him, out of one-half of it, to pay off the amount in five or six years; and he knew that Fall expected to leave the service of the Government and accept employment with one of his companies. A few weeks after it was given, Doheny tore Fall's signature off the note so that it would not be enforceable in the hands of others. December 1, Fall gave instructions to subordinates that the petition of the Petroleum Company for reduction of royalties should not be granted but that, as relief, the company be given another lease at regulation royalties." (p. 494)

(d) "Long in advance of receipt of bids Fall knew that the Transport Company would offer to construct storage facilities at cost and to fill them with fuel oil in exchange for royalty oil and for the assurance that other leases on

lands in Reserve No. 1 would be granted to it. Others were not advised that the United States would consider a bid conditioned on assurance to the bidder of other leases or preferential right to leases. Due to the interest of Fall, the Transport Company had opportunities for conference with and advice from those acting for the United States which were not given to others. There were five other oil companies with which officers or employees of the United States conferred as to the proposed contract. Fall knew that two of these would not bid because they considered the proposed contract illegal; that two of the others had not been invited to bid, and that the other one would refuse to bid unless authority for the contract should be obtained from Congress. Invitation for proposals was sent two construction companies; but Fall understood and stated that it was impossible for either of them to bid because payment had to be made in royalty oil. April 13, Fall left Washington for Three Rivers, New Mexico. Before leaving he gave instructions that no bids should be accepted or contract awarded without his consent. The bids were opened April 15. Four were received; one was conditioned upon Congressional approval of the contract; one did not cover the construction work and applied only to furnishing the fuel oil; the other two proposals were from the Transport Company: one of them, designated A, was in accordance with the invitation for bids, but the other, called B, was not. The latter named the smaller lump sum in barrels of crude oil; it stated that if actual cost was less than a specified amount the saving should be credited to the Government; and it was conditioned upon granting the bidder preferential right to become lessee in all leases that thereafter might be granted by the United States for recovery of oil and gas in Reserve No. 1. On April 18, Edward C. Finney, Acting Secretary of the Interior, telegraphed Fall that certain officials and employees of the United States recommended acceptance of proposal B; on the same day Fall consented by telegram, and Finney sent a letter to the company purporting to award the contract to it. Cotter then stated that the Transport Company did not desire to make the contract unless the United States would agree, within twelve months, to grant the company a

lease or leases of lands in Reserve No. 1. He also raised the question whether the executive order of May 31, 1921, had any legal force and refused to permit the company to make the contract unless Denby should sign as Secretary of the Navy. April 20, Arthur W. Ambrose of the Bureau of Mines was sent from Washington to Three Rivers with the papers in the case. He was instructed to consult Fall as to whether Denby should be made a party to the contract. April 23, Fall by telegram agreed that Denby should be made a party and directed Finney to execute the contract for the Department of the Interior. While it is not clearly shown that Ambrose took with him a draft of the letter of April 25, signed by Denby and Finney and sent to Cotter, he was instructed to, and did, consult Fall concerning it. That letter declares that the company's proposals were the lowest received by the Government. After stating that, expressed in money, proposal B is the better by $235,184.40, and by the possible saving by performance for less than the estimated cost of construction, it said: 'It is evident from our conversation of April 18 that your interpretation of preferential right was to the effect that the . . . Transport Co. desired the right to lease certain specified land in naval petroleum reserve No. 1 as well as preferential right to lease other land in naval petroleum reserve No. 1 to the extent described in Article XI of contract. It is also my understanding from your conversation that unless the . . . Transport Co. could get a lease to certain lands, your company would not desire to enter into a contract under the terms outlined in proposal (B) and preferred the government would accept proposal (A).' The letter then stated that the Department favored proposal B and reiterated its stated advantages over the other proposal. Then it said: 'In order that the Government may take advantage of a contract embodying the terms outlined in proposal (B), I wish to advise you that the Department of the Interior will agree to grant to the . . . Transport Co. within one year from the date of the delivery of a contract relative to the Pearl Harbor project leases to drill the following tracts or land.' The letter specified the quarter section covered by the lease of June 5, 1922, and an additional strip, and stated that the

royalties to be required would not be greater than specified rates ranging from 12½ to 35 percent. The preferential right was inserted to prevent competition. The assurance that additional leases would be given was not necessary or required under proposal B.

"After the making of the contract of April 25, the posted field price of crude oil declined rapidly. In the autumn of 1922 the Transport Company and Doheny were in correspondence or consultation with Fall for the purpose of at once securing additional leases in Reserve No. 1. Doheny submitted a proposition to Fall which the latter delivered to his subordinates with his favorable recommendation. Later Doheny enlarged the proposition, and there followed negotiations concerning the proposed lease. Doheny and Fall agreed upon a schedule of royalties. The lease of December 11 was arranged without competition of any kind. Plans for the proposed construction work had not been prepared. Before the contract and lease were made Fall and others in his Department stated to persons making inquiries that it was not the intention to make leases or to drill in that Reserve. The danger of drainage had been eliminated by agreement between the United States and oil companies operating in the vicinity that no drilling should be done by either except on six months' notice to the other." (pp. 494–497.)

18. An appeal was taken by both sides from the decree of the District Court to the Circuit Court of Appeals, which, on January 4, 1926, in an opinion reported in 9 F. (2d) 761, affirmed in part and reversed in part the decree of the lower court. The last paragraph of this opinion reads as follows:

> The decree of the court below, so far as it awards affirmative relief to the United States in ordering the cancellation of the leases and contracts, and commands the defendants to surrender possession of the lands mentioned in the bill of complaint, and enjoins them against trespassing thereon or removing property therefrom, is affirmed. That portion of the decree which directs that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditures of money in drilling and

putting on production any wells drilled under the leases is reversed, and the cause is remanded to the court below for further proceedings in accordance with the foregoing opinion.

With reference to the findings of fact by the District Court the Circuit Court of Appeals said (p. 768):

> * * * We find no ground for disturbing the findings of fact, which we deem essential to the decision of the case, and, while the evidence may be insufficient to support certain contested findings, the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance.

19. In the Supreme Court the plaintiffs argued, as stated by the Supreme Court (p. 498), "that the Secretary of the Navy did in fact exert the authority conferred by the Act of June 4, 1920, and that Fall did not dominate the making of the contracts and leases; that it was not proved by any evidence competent or admissible against the companies that Doheny gave Fall $100,000; that the giving of the money did not affect the transaction; that it was a loan and not a bribe, and that the record does not sustain the conclusion of the District Court."

Of this argument the Supreme Court said: "We have considered the evidence, and we are satisfied that the findings as to the matters of fact here controverted are fully sustained, except the statement that Denby signed the contracts and leases under misapprehension and without full knowledge of the contents of the documents. As to that the record requires an opposite finding. Under the Act of June 4, 1920, it was his official duty to administer the oil reserves; he was not called as a witness, and it is not to be assumed that he was without knowledge of the disposition to be made of them or of the means employed to get storage facilities and fuel oil for the Navy. He is presumed to have had knowledge of what he signed; there are direct evidence and proven circumstances to show that he had. But the evidence sustains the finding that he took no active part in the negotiations, and that Fall, acting collusively with Doheny, dominated the making of the contracts and leases. The finding that Doheny caused the $100,000 to be given to Fall is adequately sustained by the evidence." (p. 498)

"The facts and circumstances disclosed by the record show clearly that the interest and influence of Fall as well as his official action were corruptly secured by Doheny for the making of the contracts and leases; that, after the executive order of May 31, 1921, Fall dominated the administration of the Naval Reserves, and that the consummation of the transaction was brought about by means of collusion and corrupt conspiracy between him and Doheny. Their purpose was to get for petitioners oil and gas leases covering all the unleased lands in the Reserve. The making of the contracts was a means to that end. The whole transaction was tainted with corruption. It was not necessary to show that the money transaction between Doheny and Fall constituted bribery as defined in the Criminal Code or that Fall was financially interested in the transaction or that the United States suffered or was liable to suffer any financial loss or disadvantage as a result of the contracts and leases. It is enough that these companies sought and corruptly obtained Fall's dominating influence in furtherance of the venture. It is clear that, at the instance of Doheny, Fall so favored the making of these contracts and leases that it was impossible for him loyally or faithfully to serve the interests of the United States. The lower courts for that reason rightly held the United States entitled to have them adjudged illegal and void." (p. 500.)

20. As stated in the foregoing finding, the Supreme Court declined to decide whether or not the transaction between Doheny and Fall constituted bribery as defined in the Criminal Code, but Fall was indicted for bribery in the Supreme Court of the District of Columbia and was convicted, his conviction was affirmed by the Court of Appeals of the District of Columbia (49 F. (2d) 506), and certiorari was denied by the Supreme Court. (*Fall* v. *United States*, 283 U. S. 867.)

21. On the question of plaintiff's right to a credit for its expenditures in the construction of the storage facilities and of the Petroleum Company's right to a credit for its expenditures in drilling, etc., the court said: "In suits brought by individuals for rescission of contracts the maxim that he who seeks equity must do equity is generally applied, so that

the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. 'The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction.' *Neblett* v. *Macfarland*, 92 U. S. 101, 103. And, while the perpetrator of the fraud has no standing to rescind, he is not regarded as an outlaw; and, if the transaction is rescinded by one who has the right to do so, 'the courts will endeavor to do substantial justice so far as is consistent with adherence to law.' *Stoffela* v. *Nugent*, 217 U. S. 499, 501. The general principles of equity are applicable in a suit by the United States to secure the cancelation of a conveyance or the rescission of a contract. *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 339; *United States* v. *Stinson*, 197 U. S. 200, 204; *State of Iowa* v. *Carr*, 191 Fed. 257, 266; cf. *Mason* v. *United States*, 260 U. S. 545, 557, *et seq.* But they will not be applied to frustrate the purpose of its laws or to thwart public policy." (pp. 505–506.)

The court then discussed several cases holding the United States was not under the obligation to return any benefits it had received under a fraudulent transaction entered into to circumvent its laws, and concluded: "It was the purpose of those making the contracts and leases to circumvent the laws and defeat the policy of the United States established for the conservation of the naval petroleum reserves. The purpose of the representatives of the Department was to get for the Navy fuel depots or storage facilities that had not been authorized by Congress. The leases were made to obtain the crude products for use as a substitute for money to make good the amounts advanced by petitioners to pay for such improvements. The Secretary's authority to provide facilities in which to 'store' naval reserve petroleum or its products did not extend beyond those that might be provided by use of the money made available by the Act of June 4, 1920. And, in order to get control of the oil lands covered by the leases, the companies agreed to pay for these unauthorized works of construction and to furnish fuel oil and other products of petroleum suitable for naval use to fill the storage

facilities so added. The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption, and fraud. The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. Its position is not that of a mere seller or lessor of land. The financial element in the transaction is not the sole or principal thing involved. This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them or the value to the Government of the improvements made or fuel oil furnished as all were done without authority and as means to circumvent the law and wrongfully to obtain the leases in question. As Congress had not authorized them, it must be assumed that the United States did not want the improvements made or was not ready to bear the cost of making them. No storage of fuel oil at Pearl Harbor was authorized to be made in excess of the capacity of, or in any places other than, the facilities provided for that purpose pursuant to authorization by Congress. Whatever their usefulness or value, it is not for the courts to decide whether any of these things are needed or should be retained or used by the United States. Such questions are for the determination of Congress. It would be unjust to require the United States to account for them until Congress acts; and petitioners must abide its judgment in respect of the compensation, if any, to be made. And this applies to the claim on account of the fuel oil as well as to the other items. Clearly petitioners are in no better position than they would be if they had paid money to the United States, instead of putting the fuel oil in storage. Equity does not condition the relief here sought by the United States upon a return of the consideration." (pp. 508–510.)

22. Upon remand of the case to the District Court that court entered its decree directing the plaintiff to pay to the

United States the sums debited in finding 16, with some additional items and interest, which, in the amount of $11,092,264.82, were paid September 6, 1927; and the Petroleum Company was directed to pay to the United States the sums debited in finding 16, with additional interest, which were also duly paid.

23. All expenditures on account of construction work performed at Pearl Harbor, Hawaii, pursuant to the contracts of April 25 and December 11, 1922, were duly certified by Naval officers on the job at Pearl Harbor and by Admiral Gregory, Chief of the Bureau of Yards and Docks, Navy Department.

The actual cost to the plaintiff of constructing the storage facilities at Pearl Harbor in pursuance of the two contracts of April 25 and December 11, 1922, was $7,350,814.11; and the actual cost to the plaintiff of the 1,453,275 barrels of fuel oil furnished pursuant to the terms of the said two contracts and delivered into the storage facilities thus constructed at Pearl Harbor was $1,986,142.47, making a total of $9,336,956.58.

The plaintiff duly performed all terms and conditions of the contracts dated April 25 and December 11, 1922, on its part to be performed at Pearl Harbor, and prior to the date of the original decree of the District Court had completed all work and supplied the fuel oil as required by the terms of said contracts.

The United States, by the Navy Department, has been in full charge and control of the aforesaid storage facilities constructed and fuel oil furnished by the plaintiff at Pearl Harbor pursuant to the contracts dated April 25 and December 11, 1922, from the date of the Supreme Court's decision to the present time, and has been using them.

24. At the time the suit to cancel the contracts and leases was started on March 17, 1924, the storage facilities at Pearl Harbor had not been completed, and on account of the imminence of the suit plaintiff was about to stop the work. To prevent this Doheny wrote plaintiff on March 10, 1924, in which he agreed to save it harmless from any loss on account of further work to be done, if plaintiff would complete construction of the facilities. The work was completed

pursuant to this agreement and a stipulation between counsel for the parties in the suit to cancel the contracts and leases, dated April 14, 1924.

The cost of completion after the date of Doheny's letter was $1,284,194.10. This sum was paid plaintiff by Doheny. It is a part of the $9,336,956.58 now being claimed by plaintiff.

25. In August 1928 one of plaintiff's stockholders commenced a suit against Doheny to recover the sums expended by plaintiff for the construction work done and the fuel oil furnished at Pearl Harbor. This suit was settled on June 10, 1930, by the payment to plaintiff by Doheny of the sum of $2,700,000. This sum is also included in the amount now being claimed by plaintiff.

26. On June 10, 1933, plaintiff entered into an agreement with Doheny, whereby it promised to refund to him the $1,284,194.10 and the $2,700,000, if it was able to secure from Congress an appropriation for the cost of constructing the storage facilities and furnishing the fuel oil at Pearl Harbor amounting to $9,336,956.58. Plaintiff also agreed that if it secured from Congress any sum in excess of the net cost to it of the construction of these facilities and the furnishing of this fuel oil, it would turn over such excess to Doheny. By "net cost" is meant the difference between the total cost of $9,336,956.58 and the $3,984,194.10 paid to plaintiff by Doheny.

27. The foregoing are the facts relative to the suits instituted to cancel the contracts under which the storage facilities were constructed and the fuel oil was furnished, for which payment is now being requested. But the following facts are pertinent to a consideration by Congress of plaintiff's request for the cost of the construction of these facilities and the furnishing of this oil.

28. In addition to the leases of June 5, 1922, and December 11, 1922, entered into with plaintiff, the Assistant Secretary of the Interior also executed three other leases to plaintiff's subsidiary, the Petroleum Company, two dated December 14, 1921, and one dated February 8, 1922, covering oil lands in Naval Petroleum Reserve No. 1. Suit was brought in the District Court for the Southern Division of

California to cancel these leases on the ground that they also had been fraudulently and corruptly entered into and without authority of and in defiance of the established policy of Congress.

The disposition of the suit was deferred to await final determination of the suit to cancel the contracts of April 25, 1922 and December 11, 1922, and the leases issued in pursuance thereto. After this case had been finally decided, the trial of the suit involving the three above-mentioned leases was begun. The District Court held that only one of the leases should be declared void on account of the dealings between Fall and Doheny, but denied the United States any relief at all because, it held, the Government should have prayed for relief from these three leases in the same suit in which it had asked cancellation of the contracts of April 25, 1922 and December 11, 1922, and the leases issued pursuant thereto.

The Circuit Court of Appeals reversed the District Court, and held (55 F. (2d) 753, 771), "these three leases were vitiated by the same fraud that was condemned by the Supreme Court in the first case [*United States* v. *Pan American Transport and Petroleum Company*, 273 U. S. 456]. We find nothing in the record to purge them of that fraud." The case was remanded to the District Court with instructions to enter a decree in accordance with the prayer of the amended bill.

Upon remand the District Court, on January 14, 1933, entered a decree cancelling the leases, and awarded the United States a judgment against the Petroleum Company in the sum of $9,277,666.17, the value of the oil and oil products extracted under the said three leases, with interest. No credit was given for the expense of drilling, etc., nor does it appear from the record before us what were these amounts.

The judgment awarded has not been fully paid. As of July 1, 1942, the unpaid balance of the principal of the judgment was $2,780,587.41, and on that date there had accumulated interest in the amount of $981,257.70.

At the time of the execution of these leases the plaintiff herein owned and controlled all of the stock of the Petro-

leum Company, as heretofore stated, but on January 1, 1925, it disposed of its interest in this company.

29. By May 12, 1925, E. L. Doheny and his family had disposed of all their stock in the plaintiff. On June 30, 1941, The Standard Oil Co. (Indiana) owned 3,697,612 shares of the common stock of that company out of a total of 4,702,944.5655 shares.

The control and majority ownership of the plaintiff was acquired by the Standard Oil Co. by a number of transactions beginning about the first of April 1925.

On March 27, 1925, the Pan American Eastern Petroleum Corp. was organized to acquire control of plaintiff. By May 12, 1925, it had acquired 501,000 shares of its common stock out of a total of 1,001,557 shares, giving it the desired control. In turn the Standard Oil Co. had acquired control of Pan American Eastern Petroleum Corp. by May 23, 1927. It acquired 257,778 shares on May 19, 1927, and 32,222 shares on May 23, 1927, out of a total of 550,000 shares.

Both dates were after the Supreme Court's decision above quoted from.

By December 31, 1927, the Standard Oil Co.'s holdings had been increased to 440,000 shares.

By December 31, 1929, the Pan American Eastern Petroleum Corp. had apparently been dissolved. At any rate, on that date the Standard Oil Co.'s ownership of plaintiff was direct and not through the medium of the Pan American Eastern Petroleum Corp. The Standard Oil Co. then owned 908,852 shares of plaintiff's common stock out of a total of 999,958.248 shares, and owned 1,784,254 shares of its Class B common stock out of a total of 2,360,740.5333 shares.

30. On the question of delay or laches the facts are: The Supreme Court's decision was rendered February 28, 1927. The bill for the relief of the plaintiff was introduced in Congress February 18, 1941, about 14 years later. The record does not disclose whether the plaintiff in the meantime had made any effort to secure the introduction of such a bill.

In accordance with the provisions of section 151 of the Judicial Code (U. S. Code, Title 28, section 257) the court stated its conclusions, as follows:

1. The plaintiff has no claim against the United States either at law or in equity.

2. The United States has received and retains the benefit of the work done and the materials furnished and if it were a private person it would have been obliged to pay the value thereof to plaintiff as a condition to the relief granted. Such an obligation does not rest on the United States because the fraud committed not only involved pecuniary loss to the United States, and the corruption of its public officials, but was in defiance of the laws of Congress and resulted in the defeat of the declared policy of Congress concerning the national safety. It is for Congress only to say whether or not this shall be forgiven and the wrongdoer shall be restored to the *status quo ante*.

In arriving at a conclusion, it is pertinent to consider, in addition to the wrong done the United States and the pecuniary benefits received by it, the following:

(a) $3,984,194.10 of the amount claimed, if recovered, is payable to Doheny.

(b) There is an outstanding judgment in favor of the United States against a company that at the time of the fraud was plaintiff's wholly-owned subsidiary and was a party to the fraudulent transactions, but which no longer has any connection with plaintiff.

(c) That after the final decision awarding judgment against plaintiff the old stockholders sold about three-fourths of their stock to a corporation not formerly interested in plaintiff, and that company will be the principal beneficiary of any sum awarded.

The foregoing findings of fact and opinion and conclusions will be certified to Congress in accordance with Senate Resolution 84 and section 151 of the Judicial Code. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

MAURICE L. BEIN, INDIVIDUALLY, AND MAURICE L. BEIN, INC. v. THE UNITED STATES

[No. 44619. Decided December 6, 1943]*

On the Proofs

Government contract; recovery limited to exceptions specified in final settlement.—In suit against the Government arising under a construction contract, recovery by contractors is limited to the items and amounts specified as exceptions in the release given to the Government upon final settlement. *P. J. Carlin Construction Co.* v. *United States*, 92 C. Cls. 280, 305, cited.

Same; change of plans involving extra costs for temporary heat.—Where, in contract for construction of Government building project, the specifications permitted contractors to elect whether they would erect their own temporary heating plant or use the facilities of a public utility central heating system, which system was designated in the contract and specifications as to be used also for permanent heating; and where plans and specifications were subsequently changed by the Government so as not to utilize said central heating system; and where thereby, on account of the prohibitive cost, it became impracticable for the said central heating system to be utilized for temporary heat by the contractors, who thereupon constructed their own temporary heating plant; it is *held* that the plaintiffs are entitled to recover for extra expense representing the difference between the actual cost of supplying temporary heat and what it would have cost to provide temporary heat from the public central heating plant as contemplated under the original plans.

Same; positive statements in contract binding upon the Government.—The positive statements in the contract in suit as to the source from which permanent heat was to be procured must be taken as true and binding upon the Government and loss resulting from the mistaken representation of an essential condition should fall upon the defendant rather than upon the plaintiffs even though there are provisions in other paragraphs of the contract requiring the contractor to make independent investigations of facts. *Hollerbach* v. *United States*, 233 U. S. 165, cited.

Same; prior indebtedness against property not an obligation of contractor.—Back charges made by the city water department against the property to be used as site of Government building project were not properly included in licenses, permits, certifi-

*Defendant's motion for new trial overruled May 1, 1944.

cates, etc., which under the provisions of the contract the contractors were to procure at their expense; such back charges constituted a prior indebtedness against the property and did not constitute an obligation undertaken by the contractors in the contract.

Same; decisions of contracting officer and head of department grossly erroneous.—The decisions of the contracting officer, as well as the decisions of the head of the department on appeal, on the issues in the instant suit were so grossly erroneous that they should be set aside as amounting to bad faith, and plaintiffs are entitled to recover.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiffs. *Mr. Harry D. Ruddiman* and *King & King* were on the briefs.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea* for the defendant.

The court made special findings of fact as follows:

1. During all times herein mentioned plaintiff Maurice L. Bein was and now is a citizen of the United States and a resident of Chicago, Illinois, engaged in construction work, and plaintiff Maurice L. Bein, Inc., was and now is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois, engaged in construction work.

2. June 11, 1937, the plaintiffs jointly and severally entered into a contract with the United States, through the Federal Emergency Administration of Public Works, to furnish the materials, and perform the work for the construction of the superstructure, including the electrical overhead and underground distribution system, included by "General Work for Base Bid No. 6" for the Brewster Housing Project, No. H–1201, in Detroit, Michigan, in strict accordance with the specifications, schedules, and drawings, for the consideration of $2,971,000.

The contract is in evidence with the specifications and is made part hereof by reference.

3. The Brewster Housing Project consisted of 38 buildings occupying seven city blocks in the City of Detroit. In the group of buildings there were 701 apartments containing

approximately 3,000 rooms, exclusive of basement rooms, and in addition there were 20 stores and an administration building. On four of the blocks the excavation for and construction of the foundations had been performed by another contractor before the contract with plaintiffs was entered into. Plaintiffs under their contract with defendant were to construct the buildings upon these foundations. In the other three blocks the plaintiffs were to excavate for and construct the foundations, and to construct the buildings thereon.

4. Plaintiffs were to commence work upon receipt of notice to proceed and to complete the project within 410 calendar days thereafter. Plaintiffs received notice to proceed June 25, 1937, which fixed the completion date as August 9, 1938. By change orders the completion date was extended to September 5, 1938. Plaintiffs started work July 6, 1937, and the project was completed August 11, 1938.

WATER PERMITS

5. Article 10 of the contract reads as follows:

> *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

The two paragraphs on pages 11 and 12 of the specifications under the heading "PERMITS" are as follows:

> 1. (See the Contract.) The Contractor shall, without additional expense to the Government, obtain all required licenses, permits, certificates, etc., for work outside the Government's property lines, relating to the use of streets and sidewalks, the protection of public traffic, connections to utility service lines, etc. The Contractor will not be required to obtain building or other permits for work inside the Government's property lines.
>
> 2. The Contractor is cautioned, however, that when it is his responsibility to make connections to City and

> other Utility Lines, the fact that the Government does not require the obtaining of permits for work inside the Government's property lines, does not excuse the Contractor from doing all things required by the City or Utility Company controlling said lines as a condition precedent to the granting of permission to tie into the lines.

A provision of Addendum No. 2 reads as follows:

> The contractor shall provide and/or arrange with the Detroit Water Board to provide the required water service piping, shutoff boxes, valves, meters and meter installation as indicated on the drawings and in accordance with the Detroit Water Board standards, and shall pay all costs in connection therewith.

6. Plaintiffs before submitting their bid on the project called upon the Detroit Water Board to find out what its fees would be in connection with tapping onto the city water mains. While making this investigation they were informed by an official of the Water Board that there was a charge against the real estate upon which this project was to be built in the sum of $5,077.40 for the removal and capping of old water stubs when the site of the project was cleared by the defendant under a separate contract approximately a year before the contract in this case was entered into. Plaintiffs were advised by the Detroit Water Board that permits to connect the buildings in this project would not be issued until the back-charges of $5,077.40 had been paid.

7. Plaintiffs decided that under the provisions of the contract and specifications the back-charges of $5,077.40 would be an obligation of the defendant and did not include this sum in their bid. After the contract was entered into the Detroit Water Board refused to issue any water permits to the plaintiffs unless the back-charges of $5,077.40 were paid. Plaintiffs called upon the defendant to pay this sum. On July 9, 1937, the Director of Housing ruled that plaintiffs were obligated to pay this sum. On July 14, 1937, plaintiffs paid to the Detroit Water Board this sum of $5,077.40 under protest and so advised the defendant by letter dated July 14, 1937. A number of letters on this issue were exchanged between plaintiffs and officers of the de-

fendant. August 26, 1938, the Acting Administrator of the United States Housing Authority wrote plaintiffs a letter, the first and last paragraphs of which read as follows:

> Permit me to refer to your appeal for reimbursement in the amount of Five Thousand Seventy-Seven Dollars and Forty Cents ($5,077.40) which you were required to pay to the City of Detroit for disconnecting old water services at the Brewster Project No. H-1201, Detroit, Michigan.
>
> * * * * * * *
>
> It is apparent from the record that in paying the item of Five Thousand Seventy-Seven Dollars and Forty Cents ($5,077.40) to the Detroit Water Board for the disconnections, you did only what you were required to do by the contract specifications, and it is my decision that you are not entitled to have the contract price adjusted to cover or include the amount so paid.

TEMPORARY HEAT

8. The specifications, on page 3, under the heading "INSTRUCTIONS TO BIDDERS," provided:

> 1. * * * Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed Contract, including local conditions, uncertainty of weather, and all other contingencies.

On page 5 of the specifications, under the heading "BIDDERS TO VISIT SITE," is the following:

> 1. Each bidder shall visit the site of the proposed work and fully acquaint himself with conditions as they now exist that he may fully understand the facilities, difficulties, and restrictions attending the execution of the Contract.

9. On page 8 of the specifications, under the heading "GENERAL OBLIGATION OF CONTRACTOR," is the following provision:

> 1. It is understood that, except as otherwise specifically stated in the Contract Documents, the Contractor shall provide and pay for all materials, labor, tools, equipment, water, light, power, transportation, superintendence, temporary construction of every nature, all

other services, facilities, and costs of every nature whatsoever necessary to execute and complete the entire work to be done under the Contract Documents and deliver it complete in every respect.

On page 11 of the specifications, under the heading: "TEMPORARY HEATING," are the following paragraphs:

1. The Contractor shall provide temporary heating, covering, and enclosures as necessary and to the satisfaction of the Contracting Officer to protect all work and material against damage by dampness and cold. Temporary heating, covering, enclosures, and ventilating shall be provided as required to dry out the buildings properly.

2. The Contractor shall supply such heating equipment as may be required and/or he may utilize with the approval of the Contracting Officer the heating equipment to be installed under the Contract Documents, or such portions thereof as are ready and available, provided that he shall leave the same in proper and acceptable condition upon completion of the work. Salamanders or other open fires will not be permitted in the buildings after the buildings have been enclosed.

10. On page 141 of the specifications, under the heading "SCOPE OF WORK," is the following paragraph:

2. The heating system shall be complete and ready for operation and shall consist of the following items:
(a) All heating systems in buildings.
(b) All underground piping distribution.
(c) All pipe covering and insulation.
(d) Heating controls system.
(e) Connections to service mains.

On the same page is another paragraph, under the heading "DESCRIPTION OF HEATING SYSTEM," which reads as follows:

1. Steam for the heating system will be supplied from the mains of the Detroit Edison Company at a pressure of approximately 25 pounds. Steam service piping will be brought by the Detroit Edison Co. to the point indicated in the meter vault indicated on block 500. The Contractor shall furnish the meter vault and the piping underground to all the buildings as shown complete with control valves, meters, etc. He shall furnish all heating systems in the buildings complete with vacuum pumps, condensation meters, and control systems.

11. In connection with the heating system references are made in the specifications to drawings—

On page 145:

> 2. Steam for the heating system will be supplied from the source shown on the drawings, and an underground steam main, distributing steam at the pressure hereinbefore specified to the buildings as indicated on the drawings, with separate low-pressure steam service for heating systems and domestic hot-water systems.

On page 152:

> 4. * * * Locations of present utilities are indicated in the drawings and represent the best information available. The Contractor is required to explore the location of the utility lines and shall make all minor adjustments in the grades and elevations of the steam main to accommodate the present lines without additional compensation. Any such alterations must first have the approval of the Contracting Officer.

12. The contract drawings contain notes relating to the heating system as follows:

(a) Drawing No. HVP–451.
  Note: "Note—Contract starts with welded connection inside vault." Vault referred to is meter vault in 500 Block.
  Note: "See Detail on Dwg. #HVP–459 Valve pit by Utility Company."
  Note: "14″ incoming Utility Company steam line (25# Pressure)."

(b) Drawing No. HVP–455.
  Note: "14″ Detroit Edison Co., Main."
  Note: "The Contractor shall verify elevation of steam main with D. E. Co."
  Note: "Valve Pit by D. E. Co."
  Note: "D. E. Co. Terminates Steam Main here."
  Note: "Contr Connects to D. E. Co., Main here."

The contract drawings of the Heating, Ventilation, and Plumbing (HVP 451) distinctly show a 14-inch main of the Detroit Edison Company in the street adjacent to the project running into that company's valve pit in the street and from this main steam was to be brought by a 12-inch pipe into a meter vault on the premises and at a short distance therefrom

connected with the Government's steam main feeding the radiation system.

13. It was the intention of the defendant to obtain steam heat for the completed buildings from the Detroit Edison Company. This intention was revealed to the plaintiffs by the provisions of the contract documents. As to the arrangements for permanent heating, plaintiffs' contract was confined to the distribution thereof in the buildings and the connection of the distribution system with the main of the Detroit Edison Co. With the source of permanent heating plaintiffs' contract was not concerned, except as to connection therewith at the site of the work, and the nature of the distribution. The drawings showed steam mains but no return pipe lines. The reason for the absence of return pipe lines was the fact that steam for heating was to be furnished by the Detroit Edison Co. and the steam thus furnished was to be wasted into sewers after it had passed through the radiators.

A steam heating plant, erected for the purpose of heating the project, would have required return pipe lines.

14. When bids were received and the contract between plaintiffs and defendant was entered into, the defendant was negotiating for a contract with the Detroit Edison Company to supply steam for heating at the Brewster Housing Project, which was known to the plaintiffs at the time. Before submitting their bid plaintiffs called on the Detroit Edison Company for estimates for steam for temporary heating. Plaintiffs furnished the areas to be heated, the temperatures to be maintained, and the length of time that heat would be required. On the information thus submitted by plaintiffs the Detroit Edison Company estimated that it would take approximately 42,200,000 pounds of steam for the period from November 15 to April 15, and at its standard rate this steam would cost plaintiffs $32,142.00.

15. In preparing their bid, and planning and executing their work, plaintiffs had counted on securing temporary heat through facilities which the Detroit Edison would use to furnish permanent heat for the project.

On August 27, 1937, defendant's Project Manager advised plaintiffs:

> Looking forward to the time when you might require temporary heat, the Government officials have been concerned in seeing that the Detroit Edison Company brings its installation up to the meter pit in the 500 block.
>
> We do not know whether you contemplate using Detroit Edison heat for your temporary work. We wish you would think the matter over in the course of the next few days and advise us definitely, if possible, just what your decision is. If it should work out in your scheme of things that you do want this service, please give us the approximate date that you would require it.

Defendant's officers understood that plaintiffs were relying for temporary heat on the availability of permanent heat from the Detroit Edison Co. for the project. August 27, 1937, the plaintiffs wired the Director of Housing, Public Works Administration, Washington, D. C., as follows:

> I have just learned from Detroit Edison that contract for steam heating service has not as yet been completed with Government. They indicate that service will not be obtainable for project until sixty days after signed contract received because of tremendous amount of work in connection therewith. We find ourselves in serious predicament as result since we have been depending on this source for our temporary heat. Anything that can be done to rush this matter will be appreciated.

On September 14, 1937, the Director of Housing wrote plaintiffs as follows:

> I am sorry to state that negotiations with the Detroit Edison Company for steam supply to the Brewster Project indicate that the Government will be required to build and operate its own control heating plant. Under these circumstances it would seem advisable that such arrangements as are necessary under your contract for the supplying of temporary heat should be immediately undertaken by you.

16. September 16, 1937, the Director of Housing sent plaintiffs a telegram to stop work in connection with steam mains until further instructions. September 21, 1937, plaintiffs wrote a letter to the Director of Housing stating that the stop order and the letter of September 14 would un-

doubtedly result in delay and added expense and that they wished to preserve their rights for claims for delays and damages.

After the exchange of a number of letters and telegrams the plaintiffs, on November 17, 1937, wrote a letter to the contracting officer, the last paragraph of which reads as follows:

> In view of the above facts and circumstances, it is our contention that we are entitled to additional compensation and extension of time, due to the added expense and work involved in constructing and maintaining a temporary boiler plant and all costs and damages incidental thereto. We, therefore, request that you give consideration to our claim and issue a proceed order for the additional work and other items of cost involved, subject to an equitable adjustment of the contract price and terms.

17. January 12, 1938, the Acting Director wrote plaintiffs a letter in which the subject of temporary heating was discussed. After referring to plaintiffs' letter of November 17, referred to in the preceding finding, and citing some provisions of the specifications, the Acting Director concluded the letter as follows:

> In view of the above, it is my conclusion that you are obligated at no additional cost to the Government to furnish all equipment and other services necessary to provide such temporary heat as is required to protect all material delivered and work performed until completion and final acceptance of your contract.
>
> Your claim, therefore, is denied.

18. By letter dated February 12, 1938, the plaintiffs appealed to the Administrator of the United States Housing Authority. September 2, 1938, the Acting Administrator wrote plaintiffs a letter in which he referred to and discussed the provisions of the contract and specifications. and the contract drawings, and concluded as follows:

> Accordingly, I find that you were required under the terms of your contract to furnish and do all things to supply the necessary temporary heat and that you are not entitled to have the contract price adjusted to cover or include any amount therefor. I regret to inform you that your appeal is therefore denied.

19. When it was made apparent to the plaintiffs that the Detroit Edison Co. was not to furnish permanent heating for the project, they undertook negotiations with that company for temporary heating. These negotiations failed because the price demanded by the Detroit Edison Co., together with the time necessary to lay the requisite mains, made such an arrangement impracticable.

After September 14, 1937, plaintiffs erected a temporary heating plant to supply temporary heat to the project during construction. The temporary heating plant consisted of temporary wooden buildings in which were installed two large boilers on brick foundations, with a large smoke stack on masonry foundation, and all necessary appurtenances and equipment to supply the necessary heat to the project. The steam mains from the temporary heating plant were connected to the permanent heating distribution system installed by plaintiffs as part of the contract, and thus heat was sent from the temporary heatng plant through the permanent heating distribution system to heat the buildings while under construction.

20. The temporary heating plant was completed and placed in operation on January 4, 1938. Although the use of salamanders was prohibited by the terms of the contract the defendant consented that salamanders could be used by plaintiffs to provide temporary heat until the temporary heating plant could be placed in operation. Plaintiffs used salamanders to provide heat until the temporary heating plant was ready for use. The use of salamanders is not a satisfactory and efficient means for providing temporary heat. From and after January 4, 1938, temporary heat for the buildings was furnished by the temporary heating plant.

21. Defendant by a separate contract with others than plaintiffs constructed a central heating plant which was not completed until after plaintiffs had completed their work on the project.

As heretofore stated the original plans did not provide for return pipe lines in the heating system, and when the negotiations for steam from the Detroit Edison Co. to heat the project failed, the stop order of September 16, 1937, referred to in finding 16, was issued. December 1, 1937,

Proceed Order No. 17 was issued, which ordered certain changes and additions in the heating system, including the installation of return pipe lines, which were necessary to adapt the heating system from the Detroit Edison Company as the source of steam to a central heating plant as the source of steam.

Under the proceed order referred to, plaintiffs made the changes and additions on the basis of cost of material and labor, plus the usual profit. For this work Change Order No. 53, dated October 11, 1938, increased the contract price by $13,606.53, without allowance for any costs of delays, did not change the contract time, and was accepted by the plaintiffs. The change order recited:

> **This change order expressly satisfies any and all claims against the United States of America and the United States Housing Authority of whatever nature or purpose incidental to or as a consequence of the change herein described.**

The order also stated that it constituted an "equitable adjustment of the contract price and the contract time." Change Order No. 53 is in evidence and made part of these findings by reference.

22. Plaintiffs expended for salamanders the sum of $321.83 and for fuel and labor in operating them the sum of $3,960.09.

Plaintiffs expended for the erection and demolition of the temporary heating plant, including labor, material, rental on material and equipment, insurance, etc., the sum of $23,896.71, distributed as follows:

(1) Piping, connecting boilers, stokers and equipment	$5,644.80
(2) Rental on boilers and stack	5,000.00
(3) Materials and supplies for erection and demolition of boilers and temporary building for temporary heating plant	5,308.16
(4) Labor and services for erection and demolition of temporary heating plant	5,925.91
(5) Rental of equipment used in erecting temporary heating plant	500.00
(6) Insurance and social security tax on cost of temporary heating plant	1,517.84
	23,896.71

Plaintiffs expended on the operation of the temporary heating plant, including labor, fuel, maintenance, etc., the sum of $18,689.22, distributed as follows:

(7) Labor for operating temporary heating plant	$5,658.11
(8) Fuel for operating temporary heating plant	8,422.08
(9) Miscellaneous supplies for operating temporary heating plant	238.92
(10) Cost of maintenance of temporary heating plant	4,223.48
(11) Boiler insurance for temporary heating plant	146.63
	18,689.22

For extra work on the project a 10 percent profit is reasonable.

23. Sometime about the middle of September, shortly after the receipt of the letter of September 14, 1937, referred to in finding 15, plaintiffs inquired of the Detroit Edison Company as to the costs of making connections to supply steam for temporary heating and were advised that a connection could be made with one of its mains 700 feet from the project, and that the cost to plaintiffs would be from $20 to $30 a foot if the temporary line was placed underground and from $10 to $15 a foot if the temporary line was placed overground. To place a temporary line underground would have taken 5 weeks, and to have placed it overground would have taken 2 weeks. As to the cost of steam after the temporary connection had been so made there was no change in the estimate shown in finding 14. The main from which the temporary line would lead off was too small and unreliable to give satisfactory service for construction purposes.

If the Detroit Edison Company had entered into a contract with the defendant to furnish steam to heat the completed buildings, the company had planned to make a connection with one of its mains 2,600 feet away. To have made that connection would have taken from 60 to 90 days after the execution of the contract.

24. The first and second paragraphs of the letter of November 17, 1937, referred to in finding 16, read as follows:

> Upon receipt of your letter of Sept. 14th, informing us that negotiations with the Detroit Edison Co. for steam service were ended and that it would be neces-

sary for us to make other arrangements for temporary heat, we immediately started a search for boilers of the type and size that would adequately serve the heating needs of the project. Both our Chicago and Detroit offices made numerous contacts and inspected a number of boilers, but it was not until a couple of weeks ago that we were able to find boilers that would be suitable.

Since temporary heat is necessary to maintain normal progress, in connection with our contract, we are proceeding with the installation of the foundations for the boiler equipment and a large smokestack and expect to have these boilers ready for operation within a very short time. These are two 400 H. P. B&W, three drum boilers, complete with Jones underfeed stokers.

25. As shown in finding 16, plaintiffs on September 16, 1937, received a stop order in connection with installing steam mains. On December 1, 1937, plaintiffs received a proceed order to resume work on steam mains and lines, referred to in finding 21. The connections of the mains and lines to convey steam from the temporary heating plant through the permanent heating distribution system were not completed until January 3, 1938. The following day the temporary heating plant was placed in operation.

26. October 7, 1937, plaintiffs by letter requested a modification in the specifications to permit the use of salamanders to dry out the plaster. By letter of October 20, 1937, plaintiffs were given permission to use salamanders until the plaster had dried out in each building, with the understanding that their use "will be discontinued as soon as the temporary heating facilities required by the contract are completed."

27. Within a month after the contract was entered into plaintiffs furnished the defendant a progress chart showing the project scheduled for completion by the end of the first week in August 1938. This chart shows plastering to begin the middle of October and to be completed the middle of April. The lack of efficient and satisfactory temporary heat prior to January 4, 1938, would have a tendency to retard plastering more than any other trade. According to the monthly estimates of work done, lathing was commenced

in September 1937 and was completed in March 1938. Plastering was commenced in October 1937 and was completed in April 1938. Over half of the plastering was done during February and March. According to the same source, finish carpentry, linoleum and asphalt tile, and interior painting were completed by July 1938. The total estimate of the work in place from July 1937 to August 1938 was $3,001,-090.76. Of this total $1,880,468.60 was done from July to December, inclusive.

28. Due to labor difficulties, plaintiffs made application on April 27, 1938, for time extension of 21 days, and on May 17, 1938, made application for time extension of 14 days. No action was taken on these applications because the contract was finished well in advance of the completion date. As heretofore stated, the completion date fixed by the contract was August 9, 1938; by change orders during the progress of the work there were time extensions of 28 days, and the project was completed August 11, 1938.

29. The proof does not support a finding that the failure of the defendant to procure steam for heat from the Detroit Edison Company to provide steam for temporary heating, when the plaintiffs needed the same, delayed the plaintiffs in the ultimate completion of the project.

The cost of straight-time employees and the general overhead costs on this project were approximately $300 a day.

30. On November 25, 1938, plaintiffs executed a release to the defendant under seal acknowledging the receipt of all sums payable under the contract except:

> Item 1. Claims for increased cost, loss and damage resulting from heating and steam mains not being located as shown on specifications and drawings and change from heating buildings by heat from Detroit Edison Company to a central heating plant $48,000.00.
>
> Item 2. Claims for reimbursement for money undersigned was required to pay because of charges against site of work by Public Water Works System of the City of Detroit, $5,077.41.

31. The decisions of the contracting officer and the head of the department on appeal on both issues were so grossly erroneous that they amounted to bad faith.

The court decided that the plaintiffs were entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiffs jointly and severally entered into a contract with the United States, through the Assistant Administrator of the Federal Emergency Administration of Public Works, to furnish the materials and perform the work for the construction of the superstructure, including the electrical overhead and underground distribution system, included by "General Work for Base Bid No. 6" for the Brewster Housing Project, No. H-1201, in Detroit, Michigan, in strict accordance with the specifications, schedules, and drawings, for the consideration of $2,971,000.

This housing project consisted of 38 buildings and occupied 7 city blocks in the city of Detroit. On four of the blocks the excavation for and construction of the foundations had been performed by another contractor before the contract with the plaintiffs was entered into. In three other blocks the plaintiffs were to excavate for and construct the foundations and to construct the buildings on the foundations on all of the blocks.

The project was to be completed within 410 calendar days after notice to proceed. The notice was given to plaintiffs on June 25, 1937, which fixed the completion date as August 9, 1938, which change orders extended to September 5, 1938.

The project was completed on August 11, 1938, 26 days before the completion date as extended. The plaintiffs were paid the sum of $3,001,090.76, which was the contract price plus certain charges which were agreed to by change orders. The plaintiffs executed a release to the defendant excepting in the release two claims for additional payment—(1) for increased cost, loss and damage resulting from heating and steam mains not being located as shown on specifications and drawings and change from heating buildings by heat from the Detroit Edison Company to a central heating plant in the sum of $48,000.00; and (2) for reimbursement for money which plaintiffs were required to pay because of charges against site of work by Public Water Works System of the City of Detroit in the sum of $5,077.41.

Plaintiffs seek to recover a much larger sum in the petition but, having reserved only these two items and stated these several amounts, they are confined to only these specified items and amounts. *P. J. Carlin Construction Co.* v. *United States*, 92 C. Cls. 280, 305.

The first item involves the extra costs plaintiffs incurred in furnishing temporary heat. The whole plan as depicted in the contract, drawings, and specifications was conceived and based on the use of steam heat to be furnished by the Detroit Edison Company. This company had mains, vaults, and pipes laid in certain streets in the city of Detroit and furnished steam for the purpose of heating buildings. It was the intention of the defendant to use this system of heating in this project. All the plans, drawings, and specifications specifically show that plaintiffs' contract was to cover only the plumbing that would connect with this system. The drawings show that a main was in the street adjacent to the project. The contract definitely states that the contractor is to construct a meter vault to this system after it has been brought into the ground of the project and the specifications state

> Steam for the heating system will be supplied from the mains of the Detroit Edison Company * * *. Steam service piping will be brought by the Detroit Edison Co. to the point indicated in the meter vault indicated on block 500. The Contractor shall furnish the meter vault, and continue the piping underground to all the buildings * * *.

And the specifications further state

> Steam for the heating system will be supplied from the source shown on the drawings, * * *.

The contract drawings plainly show a 14-inch main of the Detroit Edison Company in the street adjacent to the project running into the company's valve pit in the street and from this main steam was to be brought by a 12-inch pipe into a meter vault on the premises and at a short distance therefrom connected with the Government's steam main feeding the radiation system.

An investigation or inspection of the site would not have helped the plaintiffs. Had they discovered that the main

of the Detroit Edison Company was not on the street adjacent to the project that would not have prevented the Detroit Edison Company from erecting the main and bringing its facilities to the property by the time the plaintiffs were ready to make the connections inside the property. When the note on the drawings showed "14″ Detroit Edison Co. Main," it was a reasonable presumption that were the main not there it would be there at the proper time. There are other notes on the drawings such as "D. E. Co. Terminates Steam Main here," and "Contr. Connects to D. E. Co. Main here." All these notes gave notice to the plaintiffs that the facilities of the Detroit Edison Company would be available when the connections had been made inside the project for the temporary heat which plaintiffs were to furnish. No examination or inspection of the site would have shown that situation.

Plaintiffs' work was confined to the distribution of the heating and the connection with the Detroit Edison Company's main. A permanent heating system, independent of the Edison Company's is not mentioned in the contract, drawings, or specifications.

Under the instructions to bidders the specifications do provide that bidders are to make their own estimate of the facilities attending the execution of the proposed contract and are notified to visit the site to fully acquaint themselves with conditions as they exist, but, even without these instructions, a bidder looking at the drawings would have come to the conclusion that the main of the Edison Company's system of heating was adjacent to the project or would be brought to the place marked on the map showing it adjacent to the project.

Before the contract was executed plaintiffs knew that the defendant was negotiating with the Detroit Edison Company for the use of its heating system in the project and plaintiffs subsequently sought terms with this company for the temporary heating.

The defendant and the Detroit Edison Company could not arrive at a satisfactory contract with the result that the defendant changed the plans for the heating system by installing its own plant.

The contract for the erection of this plant was given to another company but plaintiffs were given a change order for the installation of return pipe lines. The Detroit-Edison system did not use return pipe lines. The change of the plans of the heating system radically changed the basis on which both parties had contracted. Both believed that the heat could be obtained from the Detroit Edison Company. The defendant based the entire project heating lay-out and advertised for bids with the specifications and drawings based on obtaining heat from the Detroit Edison Company.

The plaintiffs made their bid, executed the contract and went to work relying on these statements. They were justified in making their bid with the understanding that temporary heat could and would be obtained from the Detroit Edison Company and that they would not be required to construct an independent heating plant.

If the bidders were not so justified, it is plain that in a project of this magnitude they would have had to bid that much higher, resulting, in the event that a hook-up with the Edison system became an accomplished fact, in unearned profit to themselves and a corresponding inexcusable loss to the Government. It is to be noted that the Government did not ask for alternative bids.

The contract provides under "Temporary Heating":

> 1. The Contractor shall provide temporary heating, covering, and enclosures as necessary and to the satisfaction of the Contracting Officer to protect all work and material against damage by dampness and cold. * * *
>
> 2. The Contractor shall supply such heating equipment as may be required and/or *he may utilize with the approval of the Contracting Officer the heating equipment to be installed under the Contract Documents*, or such portions thereof as are ready and available, provided that he shall leave the same in proper and acceptable condition upon completion of the work. Salamanders or other open fires will not be permitted in the buildings after the buildings have been enclosed. * * * [Italics ours.]

This section of the specifications permits plaintiffs to elect whether they will erect their own temporary heating plant

or use the Detroit Edison Company's heating system. That system was the only one mentioned under the contract documents. The prohibition against the use of open fires or salamanders, combined with the fact that the heating system for the project did not provide for return pipes which are necessary for an independent heating system, necessarily forced the plaintiffs to rely on the temporary heat to be obtained from the Detroit Edison Company.

The defendant and the Detroit Edison Company were unable to agree on a fair and reasonable contract for the supply of heat to the project and the plaintiffs endeavored to procure temporary heat from the Detroit Edison Company but the price was prohibitive. The revenue which would have been derived from furnishing temporary heat did not justify the capital investment which the extension of the heating system to the location adjacent to the property would have necessitated. The Government having failed to make a contract for permanent heat, the Detroit Edison Company would not extend their system opposite the project unless the contractor would pay a revenue for the temporary heat which would cover the capital investment.

After the plans of the Government were changed so as to provide an independent heating system for the project and the plaintiffs were unable to procure temporary heat from the Detroit Edison Company, they were forced to erect their own temporary heating plant at a heavy extra outlay and now seek to recover the difference between the cost of this temporary heating plant and what it would have cost to provide temporary heat from the Detroit Edison Company under the original plans.

The positive statements in the contract as to the source from which heat was to be procured must be taken as true and binding upon the Government and loss resulting from the mistaken representation of an essential condition should fall upon the defendant rather than upon the plaintiffs even though there are provisions in other paragraphs of the contract requiring the contractor to make independent investigations of facts. *Hollerbach* v. *United States*, 233 U. S. 165.

Plaintiffs are entitled to recover the extra cost caused by the defendant's change in the contract.

Plaintiffs expended for salamanders $321.83 and for labor $3,960.09, making a total of $4,281.92; for the erection and demolition of the temporary heating plant, including labor, etc., as shown in Finding 22, the sum of $23,896.71; and on the operation of this temporary plant, including fuel, labor, etc., as shown in Finding 22, the total sum of $18,689.22.

The combined costs of temporary heat were $46,867.85 from which must be deducted the cost which the Edison Company would have charged for temporary heat, viz, $32,142, leaving a balance of $14,725.85. This sum the plaintiffs are entitled to recover.

The second claim is for back charges plaintiffs were forced to pay before the Water Department of the City of Detroit would issue permits to connect with the water supply. When the property was cleared the Water Board had removed and capped the old water stubs and charged against the property for this work the sum of $5,077.40.

When application was made by the plaintiffs for permits to make the water connections with the buildings the Water Board refused to issue permits unless these back charges were paid. In order to proceed with the work plaintiffs paid this sum under protest in addition to the charges for the permits. When plaintiffs were notified of the refusal of the Water Board to issue permits until these back charges had been discharged, they called upon the defendant to clear this indebtedness. The defendant ruled under the contract that plaintiffs were obligated to pay this sum. This ruling upon appeal was affirmed by the head of the Housing Authority.

The contract provides under the heading of "Permits":

> 1. The contractor shall, without additional expense to the Government, obtain all required licenses, permits, certificates, etc., for work outside the Government's property lines, relating to the use of streets and sidewalks, the protection of public traffic, connections to utility service lines, etc. The Contractor will not be required to obtain building or other permits for work inside the Government's property lines.
>
> 2. The Contractor is cautioned, however, that when it is his responsibility to make connections to City and other Utility Lines, the fact that the Government does not require the obtaining of permits for work inside the Government's property lines, does not excuse the Con-

tractor from doing all things required by the City or Utility Company controlling said lines as a condition precedent to the granting of permission to tie into the lines.

In Addendum No. 2 it is provided:

> The contractor shall provide and/or arrange with the Detroit Water Board to provide the required water service piping, shut off boxes, valves, meters and meter installation as indicated on the drawings and in accordance with the Detroit Water Board standards, and shall pay all costs in connection therewith.

These sections apply to permits and charges which are necessary to be procured and paid after the contract was entered into and have no application whatsoever to charges which were incurred or charged against the property while cleaning the site or for any other reason. It was the defendant's responsibility to clear the site and these back charges had no connection whatsoever with obtaining the permits, etc., for the work which plaintiffs had contracted to perform. They constituted an indebtedness against the property and not an obligation undertaken in the contract. When the contracting officer and the head of the department ruled that plaintiffs had to discharge these back charges it was a misinterpretation and wrongful construction of the contract provisions. Plaintiffs are entitled to recover $5,077.40 on this claim.

The decisions of the contracting officer and the head of the department on appeal on both issues were so grossly erroneous that they should be set aside as amounting to bad faith.

Plaintiffs are entitled to recover $19,803.25.

It is so ordered.

WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, concurring:

I concur in the foregoing opinion, but I should like to add the following:

I think we are bound by the decisions of the contracting officer and head of the department if there is any substantial

basis for them; but I do not think there is. I am convinced that the contract documents left no room for doubt that the Detroit Edison Company was to furnish the heat for the buildings and that this source of heat would be available for the necessary temporary heat; and that, this being true, there was no reasonable basis for the ruling of the contracting officer and the head of the department that the contractor was obliged to go to the extra expense of obtaining temporary heat through other means.

I am also convinced that no reasonable man could have interpreted the contract documents to require the plaintiffs to pay the charge of the water company, for which they were in no wise responsible and which, indeed, was incurred before they entered upon the performance of the contract.

This being true, I think under numerous decisions of this court and of the Supreme Court we have authority to set aside the contracting officer's decision and render that decision which the facts demand.

In *Rego Building Corporation* v. *United States*, 99 C. Cls. 445, we cited numerous decisions of the Supreme Court on the duty of the contracting officer under contracts similar to this one, and on the power of this court to set aside his decisions. The Supreme Court in them said that a contracting officer is under the duty of acting impartially in settling disputes; he is not to act as the representative of one of the contracting parties, but as an impartial, unbiased judge, and it said that if he fails to so act, but acts arbitrarily, or if his decision is so grossly erroneous as to imply bad faith, that this court has jurisdiction to set aside his decision.

Some contracting officers regard themselves as representatives of the defendant, charged with the duty of protecting its interests and of exacting of the contractor everything that may be in the interest of the Government, even though no reasonable basis therefor can be found in the contract documents; but the Supreme Court has said that in settling disputes this is not his function; his function, on the other hand, is to act impartially, weighing with an even hand the rights of the parties on the one hand and on the other.

So, when a case comes before us in which the contracting officer rules against the contractor, and there is no substantial

basis in the contract to support his ruling, or no substantial evidence to support it, or when his decision is grossly erroneous, we can hardly conclude that he has acted impartially; we can hardly say that he has been faithful to his duty to render impartial decisions; or, to paraphrase the language of prior decisions, that he has acted in good faith.

I think there was no substantial basis for the contracting officer's decision on either question in this case, and that, therefore, we have the right to set it aside and render that decision which we think should have been rendered by him.

For these reasons I concur in the result reached.

MADDEN, *Judge*, concurring:

I agree with the decision that the plaintiffs are entitled to recover on both counts of their claim. I would, however, base that decision upon somewhat different grounds.

Under the terms of the contract, the contractor entrusted to the contracting officer, subject to an appeal to the head of the department, large powers of decision with reference to important matters. Under Article 15 of the contract, that official's power was not, as is frequently the case, expressly limited to deciding disputes as to questions of fact. The words of the contract purported to give him the powers of decision of "all * * * disputes concerning questions arising under this contract * * *" with exceptions not material here. The Government urges that this court is foreclosed by this provision from all except a very narrow field of decision, i. e., whether the decisions of the contracting officer and the head of the department were "so grossly erroneous as to imply bad faith." It urges that, whether the decisions of the officials be decisions of questions of fact or questions of law, the proper function of the court is equally limited, by a contract written as this one is written.

I think the first task of the court is the construction of Article 15 to ascertain what the parties meant by it. When a contractor with the Government signs a contract containing such language, he must recognize that he is entrusting to the agents of the other party powers of great potential harm to him. He is, perhaps, willing to do this in the case

of the Government when he would not be willing to so contract with a party other than the Government, for various reasons. One is that the Government is a large and desirable customer for contractors, and therefore he cannot afford to object to the terms which it, because of the large number of its contracts, has stereotyped into all of them. Another is that while the officers to whom the contract delegates powers of decision are agents of the Government, the other contracting party, they are also public officials who, as such, are presumably worthy of trust, and they have no financial interest in the questions which may arise under the contract which interest would cause them not to be impartial. But, after having suggested reasons why a contractor is willing to sign such a potentially disadvantageous contract at all, we still have for determination the question of how much he meant to sign away when he agreed to Article 15.

The Government concedes that Article 15 does not mean what it literally says, when it concedes that there is a narrow range of decision left to us. This means, I suppose, that the contractor did not intend to submit, without judicial review, to a decision of the officials named in the contract which decision a court, if it had jurisdiction to decide the question, would classify as "so grossly erroneous as to imply bad faith." I think that the contractor did not intend to go even quite that far, though I recognize that the distinction which I suggest may be only a verbal one. If a court in which the contractor seeks relief can justify its taking hold of the case only by applying such strong language as "arbitrary," "capricious," "so grossly erroneous as to imply bad faith," then the contractor has a nearly impossible burden if he seeks relief in court. Public officials who become heads of departments and contracting officers are only rarely guilty of conduct which merits such language of condemnation. Hence, unless courts merely use the strong language when in fact they mean something else, as, e. g., that they are unable to see any evidence of any substantial weight to sustain the official's decision, the administrative determination under Article 15 is final in practically all cases.

I think that the contractor does not intend, when he agrees

to Article 15, to submit without judicial review to a decision, when all the substantial evidence and all the relevant data normally considered in arriving at such a decision are against the decision. I cannot imagine why any contractor would be willing to make such a bargain, or why the Government would want him to make it. It would follow that he had not made it, and had reserved a right to submit to a court the question of whether he had been subjected to such a decision.

This conclusion would recognize, of course, that not only the official who made the administrative decision, but also the reviewing court, are human beings, and that what seemed to the official to be evidence of substance may not seem so to the court, and that the court may, in a particular case, be wrong and the administrative official right. These human variations cannot be escaped whether the review be of the weight of the evidence, or its existence. And when the administrative official, at first, and the court, at last, have decided upon the basis of what each can see, they have done all that can be done. Neither should be required to apply epithets to the other, as a condition precedent to jurisdiction.

The relation between judge and jury, the relation between quasi judicial fact finders and reviewing courts, have been, in this respect, what I think the relation is between this court and the officials named in Article 15 of Government contracts. I see no reason why that relation would not work out as well, in practice, in the latter case as in the former ones.

In applying what I have said above to the instant case, both as to the question of the temporary heating and that of the charges made by the City of Detroit for removing old water pipes, all the evidence and other relevant data which are of substance seem to me to go against the decisions of the administrative officials. I think it was assumed, without qualification, by both parties to the contract that the steam line of the Detroit Edison Company would be available for temporary heat, and that that assumption, being of importance in computing the amount of the plaintiffs' bid, became a part of the contract. I think that, as to the water pipes, the Government was under a duty to

Syllabus

make the premises available for the plaintiffs' work, and that the language of the contract imposing on the plaintiffs the duty to obtain licenses is not susceptible of application to these charges made by the city. For these reasons I think the court is right in deciding these questions on their merits, and giving the plaintiffs the relief which it has given.

LITTLETON, *Judge*, also concurs in the two foregoing concurring opinions.

JONES, *Judge*, took no part in the decision of this case.

REX-HANOVER MILLS COMPANY v. THE UNITED STATES

[No. 45566. Decided January 3, 1944]*

On the Proofs

Taxes; surtax on undistributed net income of corporation; credit under section 26 (c) (1) of the 1936 Revenue Act.—1. Where in 1933, a corporation, pursuant to a resolution adopted by its stockholders, issued preferred stock with a provision, incorporated in the preferred stock certificates, that no dividends should be paid on its common, or other, stock, until and after a sinking fund of stated amount each year should be set aside out of earnings for the retirement of the preferred stock; it is *held* that such provision constituted a "written contract restricting payment of dividends," executed prior to **May** 1, 1936, within the meaning of section 26 (c) (1) of the revenue act of 1936. (49 Stat. 1664.)

Same; intention of Congress.—2. The principal purpose of Congress in the enactment of section 26 (c) (1) (49 Stat. 1664), providing a credit against corporation taxes, was to avoid penalizing a corporation for failure to distribute its earnings when it could not distribute them without violating an agreement previously made. *Lehigh Structural Steel Co.* v. *Commissioner*, 127 Fed. (2nd), reversing the Board of Tax Appeals, 44 B. T. A. 22, cited.

Same; agreement with preferred stockholders.—3. In the instant case, the provisions of section 26 (c) (1) are applicable to the agreement which the plaintiff corporation made with its preferred stockholders and which was evidenced by the certificates

* Motions for new trial by the defendant and by the plaintiff overruled May 1, 1944, and findings amended by striking out finding 18.

issued to them; since the agreement was a real agreement, upon the basis of which the preferred stock was purchased, and it was not intended as a means of evading taxes.

Same; earnings set aside for discharge of debt.—4. In *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, the Supreme Court could hardly have intended to read into section 6 (c) (1) a limitation of the written agreement there mentioned to agreements with creditors, when the court's language was directed to section 26 (c) (2), which expressly deals only with agreements requiring that earnings be set aside for the "discharge of a debt."

Same; meaning of "surplus".—5. Where plaintiff, in 1933, agreed in its preferred stock certificates that it would not declare dividends on its other classes of stock until it had made provision, out of its earnings or surplus, for a retirement fund for the preferred stock; it is *held* that it was not the intention of plaintiff to include in the word "surplus," as there used, the values which it had previously earned but had capitalized by declaring stock dividends in 1920 and in 1928, although it had in 1933, as a part of the same transaction with the making of the agreement changed its common stock from par value to no par value.

Same; plaintiff entitled to credit claimed.—6. Plaintiff was entitled to the credit claimed, under section 26 (c) (1); the assessment made by the Commissioner against plaintiff's income as a surtax on undistributed net income for the year 1936 was erroneous and plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. A. E. James for the plaintiff.

Mr. D. F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of the parties:

1. The plaintiff, Rex-Hanover Mills Company, a North Carolina corporation, is the successor of the Rex Spinning Company and Hanover Mills Company, reorganization involving those companies having been effected as of November 1, 1939.

2. Rex Spinning Company was incorporated under the laws of the State of North Carolina on July 12, 1915, with an authorized capital of $500,000, divided into 2,500 shares of common stock and 2,500 shares of preferred stock, the shares of both classes of stock having a par value of $100

per share. The company's business was the manufacturing of cotton yarns.

3. The original issue out of the authorized capital stock of Rex Spinning Company consisted of 2,008 shares of common stock of a par value of $100 per share, all of which were issued for value.

4. On February 20, 1920, the charter of Rex Spinning Company was amended pursuant to the provisions of the corporation law of the State of North Carolina and the authorized capital of said corporation was increased from $500,000 to $1,000,000. Following the amendment the company increased its issued and outstanding common stock of a par value of $100 per share from 2,000 shares to 6,000 shares by declaration of a stock dividend, and increased its issued and outstanding preferred stock of a par value of $100 per share from 1,000 shares to 4,000 shares by a sale of 3,000 shares of preferred stock for cash. Theretofore and in the year 1920 Rex Spinning Company issued 1,000 shares of its original authorized preferred stock for cash.

5. The outstanding capital stock of Rex Spinning Company at January 1st of each of the years from 1916 to 1933, inclusive, was as follows:

CAPITAL STOCK

	Com. stock par $100/sh.	Pfd. stock par $100/sh.
January 1, 1916	$200,800	
January 1, 1917	200,800	
January 1, 1918	200,800	
January 1, 1919	200,800	
January 1, 1920	200,000	
January 1, 1921	600,000	$400,000
January 1, 1922	600,000	400,000
January 1, 1923	600,000	400,000
January 1, 1924	510,750	400,000
January 1, 1925	510,750	400,000
January 1, 1926	510,750	400,000
January 1, 1927	510,750	360,000
January 1, 1928	511,000	360,000
January 1, 1929	600,000	360,000
January 1, 1930	600,000	360,000
January 1, 1931	600,000	358,000
January 1, 1932	550,000	340,100
January 1, 1933	550,000	320,500

6. On October 17, 1933, the charter of the Rex Spinning Company was again amended and the authorized share structure was changed to 10,000 shares divided into 6,000

shares of common stock without par value and 4,000 shares of preferred stock having a par value of $100 per share. This action was taken pursuant to a resolution of the directors adopted at a meeting held October 11, 1933, submitting the proposal to the stockholders, and reading as follows:

> RESOLVED, that in the judgment of the Board of Directors of this Company it is advisable to amend section four of the Certificate of Incorporation so as to cause the same to read as follows:
>
> "4. The total number of shares of stock authorized is 10,000 shares, divided into 6,000 shares of common stock having no par value, and 4,000 shares of preferred stock, having a par value of $100.00 per share, such preferred stock to have such preferences, dividend rate, conditions, restrictions and limitations as shall be agreed upon by the stockholders and they do hereby call a special meeting of the common stockholders, to be held at the company's office in the City of Gastonia, on Wednesday the 16th day of October 1933, at 2 P. M., to take action upon the above resolution.

This resolution was duly ratified by the stockholders of Rex Spinning Company at a meeting held on October 16, 1933, at which meeting the following resolution was duly adopted:

> RESOLVED, That in the judgment of the stockholders, it is deemed advisable to amend section four of the Certificate of Incorporation so as to cause the same to read as follows:
>
> "4. The total number of shares of stock authorized is 10,000 shares, divided into 6,000 shares of common stock having no par value, and 4,000 shares of preferred stock, having a par value of $100.00 per share, such preferred stock to have such preferences, dividend rate, conditions, restrictions and limitations as shall be agreed upon by the stockholders."
>
> RESOLVED, FURTHER, That the President and Treasurer execute under their hands and the seal of the corporation, duly proved as in the case of deeds to real estate, a certificate setting forth the foregoing resolution and the action of this body thereon, which said certificate, together with the written assent of more than two-thirds in interest of the outstanding common capital stock of this company, they shall cause to be filed in the office of the Secretary of State of North Carolina, and in the

office of the Clerk of the Superior Court of Gaston County, N. C.

Thereupon, all of the stockholders being present and voting for said resolutions, signed the written certificate of their assent to the change of the charter provided for therein, to be filed in the office of the Secretary of State.

Upon motion of Mr. Rudisill, seconded by Mr. Robinson, the following certificate of preferred stock was adopted, and on motion of Mr. Robinson, seconded by Mr. Rudisill, the officers of the corporation were authorized, empowered and directed to issue and sell not to exceed $250,000.00 of such preferred stock, the proceeds of such sale to be used in the retirement of a like amount of the present issue of preferred stock now outstanding. Both said resolutions were unanimously adopted.

This is to certify that ———— is the owner of ———— fully paid shares of the Preferred Capital Stock of Rex Spinning Company, transferable only in person or by attorney, on the books of the company upon surrender of this certificate duly endorsed. This stock is part of an issue amounting in all to $250,000.00 par value, due and maturing on or after December 1, 1938, as authorized by the amended Charter or Certificate of Incorporation of this company, filed in the office of the Secretary of State of North Carolina and recorded in the office of the Clerk of the Superior Court of Gaston County.

The holders of the preferred stock shall be entitled to receive when and as declared by the Board of Directors from the surplus or net profits of this company, cumulative dividends at the rate of (but never exceeding) 7% per annum, payable semiannually on the first days of June and December of each year. If any dividends period shall be passed without payment of the dividend, such dividend shall be cumulative and shall bear interest at the rate of 6 per cent per annum until paid. No dividends shall be paid on any other class of stock until payment shall be made of all past due and accrued dividends on the preferred stock and provision shall have been made for the current accruing dividend thereon.

The holders of the preferred stock shall in case of liquidation or dissolution of the company be entitled to receive in full the par value of their shares and accrued dividends thereon, whether declared or undeclared, with interest, out of the assets of this company before any

payment shall be made to the holders of any other class of stock.

The company shall not, without the consent of the holders of seventy-five (75) per cent of the aggregate par value of the outstanding preferred stock, create any mortgage, lien or other encumbrance upon its plant or plants, or any of the machinery constituting a part thereof or any real estate of said company, or issue bonds, notes, or other evidences of indebtedness having a longer maturity than one year, and the company shall not, without like consent, authorize or issue any stock having superior preference or priorities over said preferred stock or equal preferences or priorities. Nor shall the company guarantee the bonds, notes, or other obligations, or the dividends on the stock of any other company, firm or individual. Provided, however, that nothing herein contained shall prevent the corporation from purchasing property which may at the time of such purchase be subject to mortgage or other lien.

The preferred stock, or any part thereof, may be retired at the will of the Board of Directors on giving thirty (30) days written notice to the stockholders of record, by paying One Hundred and Five ($105.00) Dollars per share with all unpaid and accrued dividends and interest, if any.

The company shall, on December 1, 1934, and on the first day of December on each year thereafter, provide for a sinking fund by setting aside out of the assets, represented by its earnings or surplus, and before the payment of any dividends on any class of stock other than Preferred Stock, the sum of Thirty Thousand ($30,000.00) Dollars. And if there should be a failure in any year to set aside said fund it must be provided for in the next succeeding years, before the payment of any dividend on any common stock. This fund shall be kept separate and apart from all other assets of the company, and shall be used by the Board of Directors during the calender year in which such sum is set aside in purchasing the Preferred Stock at the best price obtainable, but not exceeding One Hundred and Five ($105.00) Dollars per share and accrued dividends. If sufficient Preferred Stock cannot be purchased at or below the price aforesaid to exhaust the sums in the sinking fund available therefor, the balance in the sinking fund shall be kept separate from the other assets of the company until such time as it may prove possible to purchase Preferred Stock at or below the price aforesaid.

All Preferred Stock purchased or retired by the company shall be cancelled and shall not be reissued for any purpose whatever.

This issue of Preferred Stock shall not be increased except upon the consent of three-fourths majority of the entire outstanding issue of such Preferred Stock.

The holders of the Preferred Stock shall not be entitled to vote at any stockholders meeting unless there should be default in the payment of at least three (3) consecutive semi-annual dividends, and in case of such default the holders of the Preferred Stock shall have the right to vote at all stockholders meetings, and this right shall continue until all dividends so accrued on the Preferred Stock, with interest thereon, have been paid, and on such payment, the right to vote such Preferred Stock shall immediately cease.

Witness the seal of the company and the signature of the President, and of the Secretary, this ——— day of ————, 19—.

——————— *President.*
——————— *Secretary.*

On October 17, 1933, the Rex Spinning Company filed with the Secretary of the State of North Carolina the amendment to its charter hereinabove referred to, duly amending section four of its charter in words and figures as hereinabove set forth.

7. When the stockholders and directors of plaintiff company used the words "surplus or net profits" and the words "earnings or surplus" in the reorganization agreement recited in finding 6, they did not intend to include within the meaning of those words any surplus or earnings previously accumulated and capitalized by the stock dividends previously distributed.

8. In the year 1933 and following the charter amendment of October 17, 1933, the accountant for Rex Spinning Company charged the common capital stock account appearing on its books with the sum of $550,000 representing the entire amount carried as common capital stock thereon and credited the surplus account appearing on its books with the sum of $550,000. At the time this entry was made the surplus account consisted of a deficit on the books in the amount of $166,285.34 so that the entry as so made had the effect of changing the deficit as so carried on the books

to a surplus of $383,714.66 and had the effect also of eliminating from the books the common capital stock account theretofore carried thereon. No resolutions of the Board of Directors or of the stockholders of the company were adopted authorizing or directing the making of the said entry or relating to the stated value of the said common stock other than as contained in the minutes hereinabove recited of the meeting of the Board of Directors on October 11, 1933, and the meeting of the stockholders on October 16, 1933.

9. At the date of the amendment to the charter in 1933 as hereinabove set forth, Rex Spinning Company had outstanding 3,160 shares of preferred stock issued pursuant to its original charter or pursuant to the amendment of 1920, of a total par value of $316,000, and that stock continued outstanding until after January 1, 1934.

During the month of January, 1934, the company retired 1,332 shares of its preferred stock as then outstanding and, in exchange for their old certificates, issued to the holders of the remaining 1,828 shares, new certificates under the authorization of the stockholders as hereinabove set forth and as adopted at the meeting of October 16, 1933.

During the month of February the company issued 672 shares of its new preferred stock. The total number of shares of preferred stock then outstanding was, therefore, 2,500 shares of a par value of $100 each.

The new certificates of preferred stock contained printed provisions substantially identical, so far as material, with those set forth and adopted in respect of preferred stock at the meeting of October 16, 1933. A sample copy of the new preferred stock certificates is Exhibit 1 and is made a part hereof, by reference.

A surplus account to which was posted all earnings and profits, was carried upon the books of Rex Spinning Company from its beginning to and including December 31, 1936, and all entries in respect thereof (or consolidations of such entries) are contained in the following tabular statement under the heading "Per Books."

In the column headed "Adjusted by Commissioner" is an adjusted statement of the surplus of the company for the

same period after eliminating from the said surplus as contained on the books (a) an appraisal writeup of assets resulting in a credit of $100,000 in the year 1917, (b) the charge to surplus in 1920 resulting from the stock dividend of $400,000 issued in that year, (c) the charge to surplus of $93,500 in 1928 resulting from a stock dividend in that year and (d) the credit to surplus made in 1933 as set forth in finding 8 hereof on account of the change of the value of the common capital stock of the company from a par value of $100 per share to no par value.

In addition to the foregoing, adjustments as computed by the Commissioner include the elimination (e) of a charge of $600 to surplus for premium paid on capital stock of the company purchased in 1919, (f) a charge to surplus of $22,330.33 representing a premium paid on stock of the company purchased in 1927, (g) a credit to surplus in 1928 of $1,500 resulting from a purchase of stock of the company at a discount and (h) $16,585 credited to surplus in 1932, likewise on account of stock purchased at a discount.

The Commissioner's adjustments also include three items relating to purchases of the plaintiff's common stock in 1923, 1928, and 1931, all these adjustments arising from and being consistent with his elimination of surplus debits representing the stock dividends issued by the company in 1920 in the amount of $400,000 and in 1928 in the amount of $93,500. Common stock was purchased by the company in 1923, 1928, and 1931 in the respective amounts in par value of $89,250, $5,500, and $50,000. The entire amount of the par value of the purchase was charged on the company's books to the capital stock account. Because of his elimination of the 1920 and 1928 stock dividends so as to restate the common stock in accordance with its original cost, the Commissioner made compensating adjustments in the surplus account by reason of the fact that of each three shares of stock purchased in 1923 and 1928 one share was considered by him to represent original issue stock and two shares were considered by him to represent stock dividend stock. Two-thirds, therefore, of each purchase of common stock in the years 1923 and 1928 is entered by the Commissioner in the column hereinabove designated as "Adjusted by Com-

missioner" as reductions of surplus, and one-third was regarded by him as representing a reduction of the original investment of common stock in the company. In 1931 a similar adjustment was made in slightly different proportions by reason of the stock dividend of 1928. These adjustments, as tabulated below, are respectively (i) $59,500, (j) $3,666.67, and (k) $35,930.

The purpose of the following stipulated figures is to show the surplus of the company as carried on its books and to show in figures how that surplus would be affected by the various adjustments enumerated above, all with reference to the question whether or not the company in 1936 had in fact and in law a surplus out of which the retirement of the preferred stock could have been provided for and the stock retired without reference to the profits and earnings of the said year, it being agreed that the adjustments contained in the column headed "Adjusted by Commissioner" are mathematically correct if in fact and in law resort to such adjustments or any of them is proper in determining whether or not the company had in 1936 an earned surplus available for the reserve required to be set up for retirement of its preferred stock.

Surplus per books and computation of earned surplus irrespective of appreciation of assets and stock dividends declared and issued

Year		Common stock	Surplus	
			Per books	Adjusted by commissioner
1916	Capital stock	$200,800		
1916	Profits		$55,368.52	$55,368.52
	Dividends		(12,048.00)	(12,048.00)
	12-31-16 Balance	200,800.00	43,320.52	43,320.52
1917	Profits		68,358.64	68,358.64
"	Appraisal		(a) 100,000.00	
"	Dividends		(20,080.00)	(20,080.00)
	12-31-17 Balance	200,800.00	191,599.16	91,599.16
1918	Profits		73,323.53	73,323.53
"	Dividends		(20,080.00)	(20,080.00)
"	Income tax		(12,000.18)	(12,000.18)
	12-31-18 Balance	200,800.00	232,842.51	132,842.51
1919	Profits		158,627.26	158,627.26
"	Dividends		(26,096.15)	(26,096.15)
"	Income tax		(36,643.95)	(36,643.95)
"	Income tax		(50,325.95)	(50,325.95)
"	Premium on stock		(e) (600.00)	
"	Stock retired	800.00		
	12-31-19 Balance	200,000.00	277,803.72	178,403.72

Surplus per books and computation of earned surplus irrespective of appreciation of assets and stock dividends declared and issued—Con.

Year		Common stock	Surplus	
			Per books	Adjusted by commissioner
1920	Profits		$156, 349. 45	$156, 349. 45
"	Dividends		(73, 375. 00)	(73, 375. 00)
"	Income tax		(5, 166. 74)	(5, 166. 74)
"	Stock dividend		(b) (400, 000. 00)	
	12-31-20 Balance	$200, 000. 00	(44, 388. 57)	256, 211. 43
1921	Profits		66, 915. 64	66, 915. 64
"	Dividends		(28, 263. 75)	(28, 263. 75)
"	Income tax		(33, 101. 76)	(33, 201. 76)
	12-31-21 Balance	200, 000. 00	(38, 838. 44)	261, 761. 56
1922	Loss		(69, 415. 13)	(69, 415. 13)
"	Income tax		(9, 475. 03)	(9, 475. 03)
"	Dividends		(4, 047. 75)	(4, 047. 75)
	12-31-22 Balance	200, 000. 00	(121, 776. 35)	178, 823. 65
1923	Loss		(31, 956. 17)	(31, 956. 17)
"	Income tax		(8, 207. 20)	(8, 207. 20)
"	Dividends		(21, 031. 90)	(21, 031. 90)
"	Stock purchased	(29, 750. 00)		(i) (59, 500. 00)
	12-31-23 Balance	170, 250. 00	(182, 971. 62)	58, 128. 38
1924	Loss		(140, 518. 89)	(140, 518. 89)
"	Income tax		(248. 11)	(248. 11)
	12-31-24 Balance	170, 250. 00	(323, 738. 62)	(82, 638. 62)
1925	Loss		(30, 978. 41)	(30, 978. 41)
	12-31-25 Balance	170, 250. 00	(354, 717. 03)	(113, 617. 03)
1926	Loss		(37, 790. 22)	(37, 790. 22)
"	Income tax		(5, 974. 06)	(5, 974. 06)
	12-31-26 Balance	170, 250. 00	(398, 481. 31)	(157, 381. 31)
1927	Profit		60, 386. 78	60, 386. 78
"	Dividends		(2, 100. 00)	(2, 100. 00)
"	Premium on stock		(f) (22, 330. 33)	
"	Depreciation adjustment		29, 358. 63	29, 358. 63
"	Stock sold	250. 00		
"	Balance	170, 500. 00	(333, 166. 23)	(69, 735. 90)
1928	Profits for period		107, 714. 59	107, 714. 59
"	Discount on stock		(g) 1, 500. 00	
"	Stock purchased	(1, 833. 33)		(j) (3, 666. 67)
"	Stock sold	1, 000. 00		
"	Dividends paid		(25, 200. 00)	(25, 200. 00)
"	Stock dividend		(c) (93, 500. 00)	
	12-31-28 Balance	169, 666. 67	(342, 651. 64)	9, 112. 02
1929	Profits		127, 456. 20	127, 456. 20
"	Dividends		(25, 725. 00)	(25, 725. 00)
"	Income tax		(14, 611. 12)	(14, 611. 12)
	12-31-29 Balance	169, 666. 67	(255, 531. 56)	96, 232. 10
1930	Profits		63, 618. 13	63, 618. 13
"	Dividends		(25, 195. 33)	(25, 195. 33)
"	Income tax		(14, 196. 25)	(14, 196. 25)
"	Insurance premiums		(2, 864. 00)	(2, 864. 00)
	12-31-30 Balance	169, 666. 67	(234, 169. 01)	117, 594. 65

Surplus per books and computation of earned surplus irrespective of appreciation of assets and stock dividends declared and issued—Con.

Year		Common stock	Surplus	
			Per books	Adjusted by commissioner
1931	Profits		$62,340.38	$62,340.38
"	Insurance rec'd		50,020.26	50,020.26
"	Dividends		(24,283.33)	(24,283.33)
"	Income tax		(12,486.08)	(12,486.08)
"	Insurance premiums		(3,820.30)	(3,820.30)
"	Stock purchased	($14,070.00)		(k) (35,930.00)
	12-31-31 Balance	155,596.67	(162,398.08)	153,435.58
1932	Profits		14,509.67	14,509.67
"	Discount on stock		(h) 16,585.00	
"	Dividends		(23,029.39)	(23,029.39)
"	Income tax		(8,132.24)	(8,132.24)
"	Insurance		(3,820.30)	(3,820.30)
	12-31-32 Balance	155,596.67	(166,285.34)	132,963.32
1933	Profits		66,704.90	66,704.90
"	Insurance rec'd		700.00	700.00
"	Capital stock		(d) 550,000.00	
"	Dividends		(20,518.86)	(20,518.86)
"	Income tax		(1,647.66)	(1,647.66)
"	Insurance		(3,620.30)	(3,620.30)
	12-31-33 Balance	155,596.67	425,332.74	174,581.40
1934	Profits		34,169.33	34,169.33
"	Insurance		3,300.00	3,300.00
"	Dividends		(16,527.63)	(16,527,63)
"	Income tax		(15,118.40)	(15,118.40)
"	Insurance		(3,206.30)	(3,206.30)
	12-31-34 Balance	155,596.67	427,949.74	177,198.40
1935	Profits		50,650.79	50,650.79
"	Insurance		1,550.00	1,550.00
"	Dividends		(17,500.00)	(17,500.00)
"	Income tax		(5,600.59)	(5,600.59)
"	Insurance		(3,416.30)	(3,416.30)
"	Adjustment in depreciation		(4,991.69)	(4,991.69)
	12-31-35 Balance	155,596.67	448,641.95	197,890.61
1936	Profits		113,399.77	95,270.29
"	Processing taxes not paid		54,582.87	54,582.87
"	Repairs disallowed		4,991.69	4,991.69
"	Insurance		1,700.00	1,700.00
"	Unclaimed wages		726.86	
"	Claim refund income tax		205.67	205.67
"	Dividends, cash		(32,464.96)	(32,464.96)
"	Income taxes		(19,478.78)	(19,478.78)
"	Insurance		(3,958.80)	(3,958.80)
"	Inventory adjustment		(5,971.93)	(5,971.93)
"	Processing tax refunds		(16,340.08)	(16,340.08)
	12-31-36 Balance	155,596.67	546,034.26	286,421.56

10. Copies of the balance sheets attached to the returns filed by the Rex Spinning Company for the years 1934, 1935, and 1936 are Exhibits 2, 3, and 4, and are incorporated herein by reference.

11. The reduction during the years 1934, 1935, and 1936, of the amount of preferred stock outstanding, from 3,160 shares to 1,600 shares, is shown by the following analysis of the preferred stock account:

Date	Explanation	No. shares	Par value
December 31, 1933	Balance (old)	3,160	$316,000
1934	Stock retired (old)	1,332	
	Less: Reissued (new)	672	
	Net retired	660	66,000
December 31, 1934	Balance (new)	2,500	250,000
1935	Stock retired	None	None
December 31, 1935	Balance	2,500	250,000
1936	Stock retired	900	90,000
December 31, 1936	Balance	1,600	160,000

12. The company failed to set aside the sum of $30,000 on December 1st of each of the years 1934 and 1935 for a sinking fund as provided in the sixth paragraph of the preferred stock certificate.

In its Federal income tax return filed for the calendar year 1936, Rex Spinning Company reported a net income of $109,859.59.

On January 28, and November 27, 1936, Rex Spinning Company authorized the setting aside out of its earnings for that year the sums of $30,000 and $60,000, respectively, a total of $90,000, representing the sinking fund requirement under the terms of its preferred stock for the years 1934 to 1936, inclusive, paid dividends on its preferred stock in the amount of $15,964.96 and made distributions to holders of its common stock in the amount of $16,500. During the years 1934 and 1935 the company had paid dividends on preferred stock only, in the amounts of $16,527.63 and $17,500, respectively.

13. In the determination of the undistributed net income of Rex Spinning Company for the calendar year 1936 for the purpose of the surtax imposed by Section 14 of the Revenue Act of 1936, the company took credit for the sum of $32,464.96, representing the dividends and distributions during the calendar year 1936 to holders of its preferred and

common stock, and for the sum of $30,000 out of the total sum of $90,000 set aside in the calendar year 1936 as a sinking fund in accordance with the terms of its preferred stock. As a consequence its return showed an undistributed net income of $32,075.69 and a surtax due thereon under section 14 of the Revenue Act of 1936 of $4,034.75.

14. On review of the income tax return of Rex Spinning Company for the year 1936 by the Internal Revenue Agent in Charge at Greensboro, N. C., the net income of the company for that year was determined to be reduced to $95,270.29.

In the determination of the undistributed net income of Rex Spinning Company for the calendar year 1936 for purposes of the surtax imposed by Section 14 of the Revenue Act of 1936, the Internal Revenue Agent in Charge allowed as a credit the sum of $32,464.96, representing the dividends and distributions made to holders of preferred and common stock in the year 1936, but disallowed as a credit any part of the sum of $90,000 set aside in the year 1936 as a sinking fund in accordance with the terms of the company's preferred stock. As a consequence the Revenue Agent in Charge determined that the undistributed net income of the corporation for the year 1936, subject to surtax under Section 14 of the Revenue Act of 1936, was $49,682.78, and the surtax due thereon was $8,074.75. These findings of the Revenue Agent in Charge were approved by the Commissioner and a deficiency in income tax in the amount of $6,180.59 was determined and assessed by him in accordance with the findings.

15. The total tax on income and undistributed income originally assessed against Rex Spinning Company for the calendar year 1936 was $19,353.69, of which $4,327.58 was abated on March 22, 1938. A deficiency of $6,180.59 was assessed pursuant to the determination of the Commissioner as set forth above and was paid on June 24, 1940, together with $1,197.67 interest thereon, the balance of the original tax having been paid in the year 1937.

16. On or about September 5, 1940, Rex-Hanover Mills Company, successor by merger to Rex Spinning Company, duly filed a claim for refund for the sum of $6,180.59, repre-

senting that part of the taxes paid by Rex Spinning Company for the calendar year 1936 within two years prior to the filing of the claim for refund. A true copy of the claim for refund is Exhibit 5, and is made a part hereof by reference.

By letter dated January 24, 1941, the Commissioner of Internal Revenue duly notified Rex Spinning Company, care of Rex-Hanover Mills Company, Successor, that the claim for refund filed by it had been rejected.

17. The basis for the claim for refund filed on or about September 5, 1940, and the basis for this suit, is that in the computation of undistributed net income of Rex Spinning Company, it was entitled under Section 26 (c) (1) of the Revenue Act of 1936 to a credit of $90,000, representing the sum required to be set aside in accordance with the terms of its preferred stock before any distributions could be made to holders of common stock, and that upon the allowance of that credit the company had no undistributed net income for the year 1936 as shown by the following calculations:

Net income as determined by Commissioner of Internal Revenue		$95, 279. 69
Less: Normal tax		13, 131. 95
Adjusted net income		$82, 147. 74
Less: Dividends paid credit	$32, 464. 96	
Credit for contract restricted payment of dividends (Sec. 26 (c) (1))	90, 000. 00	
	122, 464. 96	
Undistributed net income		None

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover corporation income taxes in the amount of $6,180.59 assessed against the income of its predecessor in title, Rex Spinning Company, as a surtax on that company's undistributed net income for the year 1936, and paid, with interest, by the plaintiff. The word "plaintiff," in this opinion, is used to designate either the plaintiff or its predecessor. The plaintiff claims that if

it had been given the credit authorized by Section 26 (c) (1) of the Revenue Act of 1936 it would have had no taxable undistributed net income. The tax was assessed under Section 14 of the Revenue Act of 1936 (49 Stat. 1655), the parts of which, here pertinent, are printed in the footnote.[1]

Section 26 (c) (1) (49 Stat. 1664), under which the plaintiff claims that it should have received the credit which would have relieved it of the tax here in question, is as follows:

> SEC. 26. Credit of Corporations.
> In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—
>
> *　　*　　*　　*　　*
>
> (c) Contracts Restricting Payment of Dividends.—
> (1) Prohibition on Payment of Dividends.—An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions,

[1] SEC. 14. Surtax on Undistributed Profits.
(a) Definitions.—As used in this title—
(1) The term "adjusted net income" means the net income minus the sum of—
(A) The normal tax imposed by section 13.

*　　*　　*　　*　　*

(2) The term "undistributed net income" means the adjusted net income minus the sum of the dividends paid credit provided in section 27 and the credit provided in section 26 (c), relating to contracts restricting dividends.
(b) Imposition of Tax.—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation a surtax equal to the sum of the following, * * *
7 per centum of the portion of the undistributed net income which is not in excess of 10 per centum of the adjusted net income.
12 per centum of the portion of the undistributed net income which is in excess of 10 per centum and not in excess of 20 per centum of the adjusted net income.
17 per centum of the portion of the undistributed net income which is in excess of 20 per centum and not in excess of 40 per centum of the adjusted net income.
22 per centum of the portion of the undistributed net income which is in excess of 40 per centum and not in excess of 60 per centum of the adjusted net income.
27 per centum of the portion of the undistributed net income which is in excess of 60 per centum of the adjusted net income.

only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account.

No regulation of the Department is of assistance in the solution of our problem.

The plaintiff claims that it had made such a written contract as is contemplated by Section 26 (c) (1). In 1933, upon the retiring of its old preferred stock and the issuance of new preferred stock, the plaintiff's stockholders properly authorized the plaintiff to enter into an agreement with its stockholders, and to print on the stock certificates the following language embodying the agreement:

> The company shall, on December 1, 1934, and on the first day of December on each year thereafter, provide for a sinking fund by setting aside out of the assets, represented by its earnings or surplus, and before the payment of any dividend on any class of stock other than Preferred Stock, the sum of Thirty Thousand ($30,000.00) Dollars. And if there should be a failure in any year to set aside said fund it must be provided for in the next succeeding years, before the payment of any dividend on any common stock. This fund shall be kept separate and apart from all other assets of the company, and shall be used by the Board of Directors during the calendar year in which such sum is set aside in purchasing the Preferred Stock at the best price obtainable, but not exceeding one hundred and five ($105.00) dollars per share and accrued dividends. If sufficient Preferred Stock cannot be purchased at or below the price aforesaid to exhaust the sums in the sinking fund available therefor, the balance in the sinking fund shall be kept separate from the other assets of the company until such time as it may prove possible to purchase Preferred Stock at or below the price aforesaid.

The plaintiff did not, in 1934 or 1935, put money in the sinking fund for the retirement of its preferred stock in accordance with the agreement. On January 28, 1936, the plaintiff authorized the setting aside out of its 1936 earnings, $30,000, and on November 7, 1936, $60,000, to fulfill the sinking fund requirements for 1934, 1935, and 1936. The fund was used, in 1936, to retire preferred stock of a par value of $90,000. In its income tax return for 1936 the

plaintiff only claimed a credit of $30,000 under Section 26 (c) (1). The Commissioner disallowed the credit. In its claim for refund made after the payment of the assessed deficiency, the plaintiff claimed a credit of $90,000. It now urges that a credit of $30,000 would be sufficient to reduce the tax on its undistributed income sufficiently so that it would be entitled to recover all that it sues for, and that it could in no event recover more, because of the statute of limitations. This is apparently correct, but since the Government makes no contention for a distinction between the plaintiff's right to a credit of $30,000 or a credit of $90,000, and no such distinction occurs to us, we shall not examine the point further.

The Government contends (1) that the agreement recited above was not the kind of agreement contemplated by Section 26 (c) (1); and (2) that, in the financial circumstances in which the plaintiff was in 1936, it had other undistributed earnings and profits which it could have distributed even if the Section 26 (c) (1) had been applicable to the $90,000, which other undistributed earnings and profits would have justified the tax collected and here sued for.

In disposing of the Government's first contention, we assume a negative answer to the second, i. e., we assume that the tax was not properly due if Section 26 (c) (1) was applicable to the agreement recited above.

The text of the statute seems to apply quite exactly to the agreement as made. The statute allows a credit against the "adjusted net income" in the case, *inter alia* of (c) "Contracts restricting payment of dividends." To (c) (1) we find the heading "prohibition of payment of dividends." The text of (c) (1) speaks of the non-credit amount as the amount which can be distributed as dividends "without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends."

The Government points us to certain decisions of the Supreme Court of the United States and other courts, which, it contends, support its argument. We turn to those decisions. In *Helvering* v. *Northwest Steel Mills*, 311 U. S.

46, the corporation, because of a previously existing deficit, was prohibited by state law from distributing as dividends its profits earned in 1936. The Supreme Court said:

> The only "written contract executed by the corporation" upon which respondent relies for its claimed exemption is its corporate charter, granted by the State of Washington. Upon the premises that respondent's Washington charter was a written contract, and that the Washington laws prohibiting dividend payments were by operation of law a part of that contract, the court below concluded that the taxpayer had satisfied the requirements of Section 26 (c) (1).

The Court concluded that the kind of contract contemplated by Section 26 (c) (1) was not present, and that the corporation was not entitled to the credit. The Court also said in its opinion:

> That the language used in Section 26 (c) (1) does not authorize a credit for statutorily prohibited dividends is further supported by a consideration of Section 26 (c) (2). By this section, a credit is allowed to corporations contractually obligated to set earnings aside for the payment of debts.[2] That this section referred to routine contracts dealing with ordinary debts and not to statutory obligations is obvious—yet the words used to indicate that the section had reference only to a "written contract executed by the corporation" are identical with those used in Section 26 (c) (1). There is no reason to believe that Congress intended that a broader meaning be attached to these words as used in Section 26 (c) (1) than attached to them under the necessary limitations of 26 (c) (2).

The phrase "routine contracts dealing with ordinary debts," has given rise to much discussion in later cases. The Government strongly urges its significance in our consideration of the instant case.

In the case of *Metal Specialty Co.* v. *Commissioner*, 43 B. T. A. 891, the Board of Tax Appeals held that a resolu-

[2] 49 Stat. 1664. The credit allowed is "An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside."

tion of the corporation's board of directors, approved by a resolution signed by all stockholders, providing for the amendment of the corporation's charter to restrict the payment of dividends until after the accumulation of a sinking fund to retire preferred stock, was not the kind of agreement contemplated by Section 26 (c) (1). The Board relied strongly on the Supreme Court's phrase "routine contracts dealing with ordinary debts," and concluded that a contract evidenced only by the corporate minutes, and made effective only by "delivery of the certificate of amendment and charter to the Secretary of State" was not such a "routine contract" as was described in the Supreme Court's phrase. The Circuit Court of Appeals for the Sixth Circuit agreed with the Board. 128 F. (2d) 259.

In *Warren Telephone Company* v. *Commissioner*, 128 F. (2d) 503, the same court reached the same conclusion, though there, as in the case before us, the preferred stock certificate had printed on it the provisions restricting the payment of dividends. The court said:

> The commitments contained in the stock certificates are but references to and repetitions of the charter provisions, and stand on no higher ground. Moreover, they are not contracts entered into by the corporation with creditors and are but internal agreements within the framework of corporate organization, and impose no external prohibition upon the corporation in respect to dividends.

Other language in the court's opinion shows that the Supreme Court's phrase about "routine contracts dealing with ordinary debts" was the real basis of the decision.

In *Lehigh Structural Steel Co.* v. *Commissioner*, 44 B. T. A. 422, upon facts closely analogous to those now before us, the Board of Tax Appeals denied the credit, and said:

> The legislative intent was primarily to tax corporate earnings to the shareholders; and any attempt to frustrate the tax through the nondistribution of earnings was to be futile. The method adopted was the levy of a surtax upon earnings, with credits for dividends paid and for earnings which the corporation was contractually prevented from distributing. Obviously, to recognize a voluntary restriction not imposed from outside would defeat the purpose.

We think the Board, in its effort to protect the purpose of the act, did not give sufficient weight to the fact that the agreements contemplated by Section 26 (c) (1) were agreements made prior to May 1, 1936, which was before the act which imposed the tax became effective. The statute therefore does not need to be given a construction shaped for the purpose of preventing parties, by agreement made with the objective of evading the tax, from succeeding in doing so. It would seem that the principal purpose of Congress in providing the credit, was to avoid penalizing a corporation for failure to distribute its earnings when it could not distribute them without violating its previously made agreement. This general purpose might have caused Congress to extend the credit to the corporation forbidden by law, as well as the one forbidden by agreement, from declaring dividends.[8] But the fact that the section did not go so far would not seem to be a reason for construing it more narrowly than its words seem to justify.

The Circuit Court of Appeals for the Third Circuit reversed the decision of the Board of Tax Appeals in the *Lehigh Structural Steel case*, 127 F. (2d) 67. It concluded that an agreement made by a corporation with the purchasers of its stock, expressly dealing with and restricting the payment of dividends, is no less within the contemplation of Section 26 (c) (1) because the agreement is printed on the stock certificates and is, by amendment, inserted in the corporate charter. In the *Warren Telephone Company case*, *supra*, the court referred to and disagreed with the reasoning of the court in the *Lehigh Structural Steel case.*

We think that Section 26 (c) (1) is applicable to the agreement which the plaintiff corporation made with its stockholders. The language of the section seems to be completely satisfied. The agreement was a real agreement, a natural one for the corporation to make in the circumstances, and not intended as a means of evading taxes. When persons purchased preferred stock containing this agreement, they were entitled to its benefits, not because it was imposed upon them by law, but because the plaintiff was

[8] This seems to have been done, retroactively, by Section 501 (a) (2), (b), and (c) of the Revenue Act of 1942.

willing to make it, and the purchaser was willing to buy the stock if it included it. We think the Supreme Court could hardly have intended to read into 26 (c) (1) a limitation of the written agreements there mentioned to agreements with creditors, when the Court's language was directed to Section 26 (c) (2) which expressly deals only with written agreements requiring that earnings be set aside for the "discharge of a debt."

We now consider the Government's second contention. It is that the plaintiff had, in 1936, a surplus from which it could have paid dividends after setting aside the $90,000 as required by its contract, and that therefore the plaintiff paid no greater undistributed profits tax than it properly owed.

The difference between the parties as to whether the plaintiff had an accumulated surplus of earnings arises out of the following facts. The plaintiff was incorporated in 1915, under the laws of the State of North Carolina, with an authorized capital of $500,000, divided into 2,500 shares of common and 2,500 shares of preferred stock, both of a par value of $100 per share. It issued only 2,008 of the common shares. In 1920, by amendment to its charter, its authorized capital was increased to $1,000,000. It increased its issued shares of common stock of $100 par value, from 2,000 shares, the number then outstanding, to 6,000 shares, by the declaration of a stock dividend. The par value of its outstanding common stock was then $600,000. Between then and 1933 some of this stock was retired. In 1928 another and smaller stock dividend was declared. On January 1, 1933, there were outstanding 5,500 such shares of a par value of $550,000.

On October 17, 1933, the plaintiff's charter was again amended, and the authorized share structure was so changed as to provide for 6,000 shares of common stock without par value, instead of 6,000 shares of $100 par value. The number and par value of preferred shares were set at 4,000 and $100 respectively, as before. The agreement of the stockholders and of the corporation, printed on the new certificates of preferred stock, concerning the setting aside of a fund for the retirement of the preferred stock, has already been described.

Before the 1933 reorganization the plaintiff's books showed a deficit in the surplus account of $166,285.34. After the reorganization, the company's accountant charged the common capital stock account with $550,000, the entire par value of the common stock outstanding before the reorganization, and credited the surplus account with the same amount. This changed the surplus account from the deficit of $166,285.34 to a surplus of $383,714.66. The effect of the change was to eliminate from the books any common capital stock account. The accountant made this change without any direction from the board of directors or of the stockholders. The corporation's books during the years 1934, 1935, and 1936 followed the same practice and thus showed a large surplus for each of those years. When the question of the taxation of the company's undistributed earnings under the 1936 act arose, the Commissioner of Internal Revenue went over the corporation's accounts for all the years following its organization in 1915, making "readjustments" for the reasons given in finding 8. The greatest changes made by the Commissioner in his adjustments consisted in the elimination of any effect upon the corporation's surplus accounts of the stock dividends which had been issued in 1920 and 1928, and which had been deducted from surplus on the company's books, and other changes resulting from those. The net result of his adjustments was to show a surplus of $286,421.56, at the end of 1936, instead of the surplus of $546,034.26, shown, erroneously as the plaintiff says, by the corporation's books, because of the accountant's having credited the $550,000 to surplus in 1933 when the common stock was changed to no par value.

The Government urges that the surplus shown by the Commissioner was available to satisfy the preferred stock redemption commitment made by the plaintiff in 1933, and that therefore the plaintiff's 1936 earnings could have been distributed. Since they were not, the Government says they were properly taxed as undistributed earnings.

The plaintiff, on the other hand, claims that the deficit of $166,285.34 which its books showed as of the end of 1932, persisted through the succeeding years, except as reduced by $64,927.29 during the years 1933, 1934, and 1935, and

should have shown as a deficit of $101,358.05 at the end of 1935; that credits to surplus in 1936 of $113,892.31 finally wiped out the deficit, but only by $12,534.26 by the end of 1936; that that amount of surplus available for the redemption of the preferred stock would not have relieved enough of the plaintiff's earnings for 1936 of their commitment to the preferred stock redemption fund to make the plaintiff liable for the tax here sued for. The plaintiff subtracts $550,000 from each of the annual surpluses shown on its books, saying that the accountant's addition of that amount to surplus after the 1933 reorganization, and annually thereafter, should be disregarded.

The Commissioner of Internal Revenue's theory of determining surpluses is based upon the language of Section 115 (h) (2) of the Revenue Act of 1936, which is as follows:

> SEC. 115. Distributions by Corporations.
>
> * * * * *
>
> (h) *Effect on Earnings and Profits of Distributions of Stock.*—The distribution (whether before January 1, 1936, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation—
>
> * * * * *
>
> (2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

Since, the Government says, the stock dividends declared by the plaintiff in 1920 and 1928 were not, under the doctrine of *Eisner* v. *Macomber*, 252 U. S. 189, taxable to the recipients, they should "not be considered a distribution of earnings or profits," and should not have been followed by any deduction from the corporation's surplus account. *Ergo* the plaintiff had a surplus, could have used it to satisfy the preferred stock retirement commitment, and had earnings which were distributable without violating the 1933 agreement but were undistributed and taxable.

The plaintiff says that Section 115 (h) has nothing to do with the case; that Section 26 (c) (1) permits the deduction of earnings which are foreclosed from distribution by an agreement; that while the plaintiff's agreement did permit provision to be made for the preferred stock sinking fund out of "earnings or surplus," the meaning of the word "surplus" as used in that agreement was the meaning which was in the minds of the parties to the agreement, and not some other meaning which might be found in a federal statute or elsewhere.

We agree with the plaintiff on this point. The intent of Section 26 (c) (1) is that if the corporation has made a binding agreement not to declare dividends out of certain accumulated earnings, it shall not be taxed for not declaring such dividends. Our only question is whether the plaintiff did in fact agree that it would not declare dividends until it had made provision for the preferred stock retirement fund out of earnings or surplus, not including in the word surplus as there written the values which it had previously earned but had capitalized by declaring stock dividends in 1920 and 1928, even though it had in 1933, as a part of the same transaction with the making of the agreement, changed its common stock from par value to no par value. What the accountant or even the directors did in the way of keeping books after the agreement was made would seem to have little bearing on what the parties meant by the agreement, except as evidence of what may have been in the minds of the parties at the earlier, and decisive, time.

We think the meaning which the plaintiff attributes to the agreement was the real meaning of the parties to it. If the parties had intended that the reorganization would make existing assets available for the preferred stock retirement fund, and then for the payment of dividends on the common stock some evidence of that intent would have arisen during 1934, 1935, or 1936. There would, we suppose, have been demands by stockholders that the fund be set up, and the way thus cleared for the payment of dividends on the common stock. The language of the agreement is mandatory. It says "The company shall, on December 1, 1934, and on the first day of December on each year thereafter,

provide for a sinking fund by setting aside out of the assets, represented by its earnings or surplus * * *." No money was set aside for the fund until new earnings of sufficient amount were available.

This conduct of the managers of the company in not setting aside funds for the retirement of preferred stock was also in accord with their duties under the laws of North Carolina, where the corporation was chartered. Sections 1161 and 1179 of Michie's North Carolina Code, as amended, provide:

1161. Decrease of Capital Stock.

The decrease of capital stock may be affected by—

* * * * *

6. Reducing the par value of shares.

When a corporation decreases the amount of its capital stock as above provided, the certificate decreasing the same shall be published at least once a week for three successive weeks * * *. In default of such publication the directors of the corporation are jointly and severally liable for all debts of the corporation contracted before the filing of the certificate, and the stockholders are also liable for such sums as they respectively receive of the amount so reduced. * * *

1179. Dividends.

Dividends from Profits Only; Directors' Liability for Impairing Capital.—

No corporation may declare and pay dividends, except from the surplus or net profits arising from its business, * * * nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to this chapter: * * * In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, * * *

The fact that no steps were taken by the managers of the corporation to comply with these affirmative provisions of the law is a further strong indication that they had no intention, when they made the 1933 agreement, to treat any of their existing assets as surplus, available for the preferred stock retirement fund or for dividends.

Syllabus

We conclude, therefore, that the plaintiff is entitled to recover $6,180.59 with interest as provided by law.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ORDER

This case comes before the court on motions for a new trial by the defendant and the plaintiff; and on consideration thereof

IT IS ORDERED this 1st day of May, 1944, that said motions be and the same are overruled.

On the court's own motion, IT IS FURTHER ORDERED that the special findings of fact filed herein January 3, 1944, be and the same are amended by striking out finding 18 thereof,—the findings as thus amended, the conclusion of law, judgment and opinion to stand.

DAVID McD. SHEARER v. THE UNITED STATES

[No. 41829. Decided February 7, 1944]*

On Accounting

Patent for invention relating to reinforced concrete revetment; judgment on accounting.—Following the special findings of fact and opinion of March 7, 1938 (87 C. Cls. 40), holding that plaintiff's patent (patent No. 1,173,879) for reinforced concrete revetment, claims 3 and 6, were valid and infringed by the Government, and upon a report of a commissioner as to an accounting thereunder; it is *held* that a fair and reasonable compensation to plaintiff is $319,673.16, with interest as part of just compensation, and judgment is rendered for that amount.

Same; no inconsistency in prior opinion in instant case.—The court having held in its prior opinion (87 C. Cls. 40) that plaintiff, an employe of the Government, was estopped from asserting his

* Plaintiff's motion for new trial allowed in part and overruled in part, May 1, 1944, and defendant's motion for new trial overruled; and the conclusion of law filed February 7, 1944, amended.

Defendant's petition for writ of certiorari pending.

revetment launching apparatus patent (patent No. 1,229,152) because the development of the valid claims therein was made at Government expense and because the Government thereby acquired a non-exclusive implied license to its use; the instant case is therefore not the usual case involving a vendor and vendee, and there is no inconsistency contained in the former opinion of the court in holding that the plaintiff was entitled to recover on the revetment patent (patent No. 1,173,879).

Same; method of accounting; instant case comes within entire value rule.—While in the accounting in the instant case the apportionment method is used as between the revetment patent and the launching apparatus patent, to which the defendant contributed, the apportionment rule does not apply to the groups of elements specified in claims 3 and 6 of the Shearer revetment patent, since these claims cover a novel combination of elements, even though some of them are individually old, and the pith of the invention is the entire cooperative combination and not some special details of construction; the instant case, therefore, comes within the entire value rule in which the salability or utility of an article is primarily due to the improvement imparted to the combination. *See Hurlbut* v. *Schillinger*, 130 U. S. 456; *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441; *Piaget Novelty Co.* v. *Headley et al*, 123 Fed. 897.

Same; method of computation of reasonable compensation.—The method of computation used in arriving at a reasonable compensation consists in (1) arriving at an average monetary advantage per square of articulated concrete fabricated and sunk during the accounting period; (2) apportioning such monetary advantage between the revetment patent in issue and the launching apparatus patent which the Government by virtue of its contribution was empowered to use; and (3) ascertaining from the total monetary value of the revetment patent to the Government what proportion thereof constitutes a just and reasonable compensation to plaintiff. *Olsson* v. *United States*, 87 C. Cls. 642, 659; *Mamie C. Wood et al* v. *United States*, 36 C. Cls. 418, 426, cited.

Same; interest as part of entire compensation.—Under the provisions of the special jurisdictional act, interest is included not as interest but as part of the entire compensation in accordance with *Harry F. Waite* v. *United States*, 69 C. Cls. 153; 282 U. S. 508.

The Reporter's statement of the case:

Mr. Clarence B. Des Jardins for the plaintiff.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Clifton V. Edwards* was on the brief.

The court made special findings of fact as follows:

1. This is a patent suit filed to recover the reasonable and entire compensation for use by the United States of inventions covered by three United States patents issued to David McD. Shearer. The plaintiff Shearer was in the employment of the United States at the time he made the inventions covered by the patents, and the matter is before this court under a special act of Congress (Private, No. 285, 71st Congress) (46 Stat. 1970).

The court in its special findings of fact and opinion of March 7, 1938 (87 C. Cls. 40), held that claims 3 and 6 of Shearer patent 1,173,879 were valid and had been used by the United States and that plaintiff was entitled to compensation therefor under the special jurisdictional act; that claims 6, 8, and 9 of Shearer patent 1,229,152 were valid, and the apparatus covered by these claims had been used by the United States under an implied nonexclusive license for which use the United States was not liable under the special jurisdictional act.

On the trial of this case in open court on the issues of validity and use the plaintiff withdrew any claim on account of an alleged infringement of the third Shearer patent 1,173,880, and the petition as to this patent was dismissed.

Reasonable and entire compensation is based upon the use of the first enumerated patent.

2. The accounting period in this case is from February 29, 1916, the date of issuance of Shearer patent 1,173,879, to February 28, 1933, the date of its expiration.

3. The Shearer patents relate to structures intended to protect the banks of rivers against erosion. These structures are called revetments and are customarily sunk in the river over the subaqueous portion of the bank and extend some distance out into the river bed and also up on the bank.

They are usually located on a river bend and extend along a sufficient portion of the bank to prevent the river current which impinges against the bend from eroding the bank.

The function of the revetments on a river is to stabilize the course of the river, and they have been constructed and used extensively on the Mississippi River for this purpose,

the present accounting dealing with revetment work on this river.

Shearer patent 1,173,879 relates to a revetment structure, and Shearer patent 1,229,152 relates to an apparatus for the launching or sinking of the revetment.

4. *Revetment patent 1,173,879.*—This patent, upon which the present accounting is based, is directed to what is known as an articulated concrete revetment. It relates to a structure comprising a plurality of oblong concrete blocks with continuous reinforcing wires passing through the several sections. The sections are spaced apart so that the entire structure is therefore of a flexible nature and will therefore readily adapt itself to the contours of the bank or subaqueous portion of the river upon which it is laid.

The dominant feature of the disclosure is a series of launching cables, the border strands of the individual concrete blocks being fastened to the launching cables so that, as the mat is paid out or sunk from a launching barge, the launching cables support the entire mat and relieve the individual concrete units and the mat sections from breaking strain. With respect to these features of construction, the patent specification states as follows:

> My present invention relates generally to revetment mats for the protection of subaqueous river banks and shores from current and wave erosion and to promote soil stability, and the object thereof is to provide a practical, economical structure of mat, the units of which are of concrete, whereby it may be placed in strong currents and in great depths of water.
>
> To this end my invention resides in the main in the connections both between the units themselves and between groups of such units, which connections will clearly appear from the following description, in which reference is made to the accompanying drawings, forming part of this specification, and in which— * * *
>
> A mat so constructed is not only economical of itself but is capable of being economically laid and is highly practicable for the purposes for which it is intended either in strong currents or great depths. My revetment as thus described is, furthermore, particularly adapted for difficult subaqueous application. * * *

My revetment, furthermore, possesses the additional advantage of being fabricated entirely above the water and then lowered into place for use.

The claims of this patent which the court held valid and infringed were directed to a revetment mat structure and read as follows:

3. A revetment mat consisting of a plurality of sections having exposed border strands by which they may be connected to one another, connections for uniting the border strands of adjacent sections, each of the sections consisting of a plurality of similarly spaced and flexibly connected block units and a plurality of bonding members extending continuously through the blocks throughout the section whereby to flexibly connect the blocks thereof, the said bonding wires projecting beyond the sides of the section and connected to the said border strands, and continuous launching strands extending between the several sections in one direction and connected rigidly to the border strands thereof.

6. A revetment mat including a plurality of sections spaced apart to form parallel longitudinal channels, each of said sections including a series of uniform blocks of plastic material, and a continuous bonding wire fabric extending through the several blocks and reinforcing and inseparably connecting the blocks in spaced relation, the borders of two sides of the said fabric, in the direction at right angles to the longest dimension of said block, being exposed whereby to provide means for handling and connecting the several sections, and parallel launching strands extending between the said sections, and continuous throughout the mat within said channels, said launching strands being connected to the exposed borders of the wire fabric of adjacent sections whereby to connect the sections in contiguous spaced relation and form a flexible structure of revetment mat.

5. *The Launching Apparatus Patent 1,229,152.*—This patent is directed to the mechanical structure of a launching barge for laying or sinking revetment mats. The specification indicates in its opening paragraphs that the apparatus is particularly adapted for use in connection with the articulated concrete mat of the revetment patent referred to in the previous finding.

The launching barge as disclosed in the specification of

the patent provides the working space where the smaller units of the revetment mat are attached to the launching cables and are fabricated into the final structure of the complete revetment mat. Such fabrication begins with the launching barge close to the shore, and as the mat is progressively sunk over the side of the barge which is moved toward midstream, the fabrication of the units into the revetment structure is continued until the entire revetment mat is completed and sunk.

Claims 6, 8, and 9 of this patent are as follows:

> 6. A launching barge for revetment mats comprising launching ways terminating at the delivery ends in downwardly curved inclines, sheave supporting frames associated with said curved portions, sheaves mounted in said frames in close proximity to each other, cable carrying devices mounted in said barge, launching cables carried by said devices and to which the mats are to be secured at opposite sides, mechanism for moving the barge to feed the mat therefrom, a friction device associated with each of said cable carrying devices and including friction sheaves over which said cable passes, and an adjustable brake band for controlling the speed with which the cable is fed from said devices.
>
> 8. In an apparatus for laying revetment mats, a barge having transversely extending roller ways and sheaves between the rollers, a cable carrying drum mounted on the barge, a friction device on the barge adjacent the drum, a launching cable to which mats are to be secured at opposite sides, said cable passing from the drum to the friction device and from said friction device over the sheaves between the ways, and means for operating the friction device to feed the cable and mats from the barge.
>
> 9. In an apparatus for laying revetment mats, a barge having transversely extending ways, sheaves between the ways, a cable carrying drum mounted on the barge, a pair of friction sheaves geared together, a launching cable leading from the drum, over and around the friction sheaves and from said sheaves to and over the sheaves between the said ways and to which mats are to be secured at opposite sides, and means for operating the friction sheaves to feed the cable from the drum.

The court in its opinion of March 7, 1938, held that these claims were valid and that the apparatus covered by them

had been used by the United States but that the defendant had an implied nonexclusive license to use this structure and was not liable under the special jurisdictional act.

6. The revetment patent and the launching apparatus patent are interrelated in that together they cover the complete development of an improved articulated concrete revetment with reinforcing launching cables and a mechanical structure for laying or sinking this particular type of revetment.

7. During the accounting period the defendant, through the Mississippi River Commission, fabricated and sank 887,981 squares[1] of articulated concrete revetment, all of which were covered by the terminology of claims 3 and 6 of the Shearer revetment patent, and were sunk by the apparatus covered by the valid claims of the Shearer launching apparatus patent. The total cost of this revetment work was $12,524,620.40.

The following tabulation indicates the district in which the mats were laid, the year of laying, and the cost of fabrication and sinking. This tabulation indicates an average cost of $14.10 per square, and the cost of sinking as 39.6 percent of the entire cost.

Fiscal year	District	Number of squares sunk	Cost of building	Cost of sinking	Total
1917	Vicksburg	8, 063	$34, 378. 16	$23, 297. 88	$57, 676. 04
1918	do	11, 383	66, 362. 89	43, 513. 89	109, 876. 78
1919	do	4, 659	42, 816. 21	21, 391. 73	64, 207. 94
1920	do	7, 452	110, 513. 16	55, 474. 04	165, 987. 20
1921	do	4, 919	70, 095. 75	41, 959. 19	112, 054. 94
1922	do	5, 516	44, 818. 85	16, 530. 81	61, 349. 66
1925	do	14, 220	74, 030. 85	126, 477. 92	200, 508. 77
1926	do	33, 778	231, 495. 38	306, 005. 26	537, 500. 64
1927	do	31, 319	196, 005. 17	262, 872. 76	458, 877. 93
1928	do	91, 474	659, 041. 35	520, 430. 02	1, 179, 471. 37
1929	do	105, 746	685, 234. 08	608, 846. 51	1, 294, 080. 59
1929	New Orleans	12, 668	189, 676. 29	74, 913. 82	264, 590. 11
1930	Vicksburg	73, 410	457, 344. 30	533, 074. 99	990, 419. 29
1930	New Orleans	51, 370	665, 652. 18	144, 422. 83	810, 075. 01
1931	Vicksburg	70, 504	462, 506. 24	256, 644. 18	719, 150. 42
1931	New Orleans	24. 062	254, 402. 97	164, 666. 90	419, 069. 87
1932	do	17, 483	170, 763. 49	144, 631. 28	315, 394. 77
1932	Memphis	117, 269	883, 464. 00	265, 212. 90	1, 148, 676. 90
1933	Vicksburg	44, 341	373, 794. 63	404, 943. 29	778, 737. 92
1933	New Orleans	29, 186	594, 110. 85	211, 778. 22	805, 889. 07
1933	Memphis	129, 159	1, 295, 593. 93	735, 431. 25	2, 031, 025. 18
Total		887, 981	7, 562, 100. 73	4, 962, 519. 67	12, 524, 620. 40

[1] Each square equals 100 square feet.

8. The Shearer revetment patent does not contain the basic disclosure of an articulated concrete revetment mat. Such a mat is shown in the prior art Canadian patent to Hawkes, No. 110,571.

This prior art patent, however, fails to disclose any launching cable or equivalent device incorporated in any way into the structure in order to overcome the difficulties of handling and properly placing such a necessarily heavy and bulky structure.

During the period 1910–1912 the Government did some experimental work with an articulated concrete mat similar to that shown in the Hawkes patent. This work, referred to as the Schulz construction, consisted of a series of concrete blocks or slabs reinforced by crossing wires, the protruding ends of which were formed into eyes, and these blocks were flexibly connected to each other by means of pins, bolts or an anchor cable extending through the eyes of adjacent blocks. Some of these blocks were installed in four localities either on a dry river bank or in shallow water ten to twelve feet out from the bank.

As used, the individual blocks were first placed in final position on the bank and then were subsequently connected to each other. When installed in the water adjacent the river bank about eight rows of blocks were laid on planks running from the shore to the deck of a scow. These blocks were then connected to each other through the alined eyes after they had been put in place on the planks, and the scow was then pulled away from the outer ends of the planks, permitting the planks and the slabs to fall into the water adjacent the shore line. No launching cable or equivalent device was incorporated in any way into this experimental construction.

The Schulz construction was described in the publication, Engineering Record of June 7, 1913, exhibit D–72, listed as part of the prior art considered by the court in its former finding of fact 36. The Government spent approximately $26,500 on these experiments. There is no evidence of any further governmental activity concerning articulated con-

crete revetments until the development of the Shearer inventions.

9. In its comparison of the Shearer revetment patent with the prior art the court in its former findings of fact (Finding 39) found as follows:

> This construction was of real practical importance because it made it possible to launch the mat over ways having sheaves thereon at the outer ends to carry the launching cables, and which cables in turn carry the weight of the individual blocks individually in their journey from the ways to their resting place on the bottom, thus preventing dangerous accumulation of stresses in the concrete or reinforcing members of single blocks; i. e., the weight of each block of the mat in transit from the ways to the bottom is sustained directly by the launching cables and not by other blocks, whereby each block and its reinforcement are required to sustain only their own weight.
>
> *This construction, while no more efficient or effective in its protective action than the prior art flexible concrete mattresses once properly placed on the bottom, was capable of being launched in an inexpensive, relatively quick, and completely reliable manner, even in strong currents and deep water, whereas those of the prior art were not.* [Italics supplied.]

The court amplified this and defined the scope of the invention of the Shearer revetment patent in the following phraseology:

> The distinct difference between the plaintiff's mats and prior ones is embodied in a form of structure whereby each individual concrete mat is so formed and ingeniously attached to the longitudinal launching cables as to form a concrete mattress which, in the process of launching, causes each mat unit to bear its own weight "in their journey from the ways to their resting place" on the bottom of the stream.
>
> * * * * *
>
> The problem confronting plaintiff was not the construction of individual concrete mats. What the inventor had to do was to take a structure of unusual weight and attach it to cables of unusual strength in such a way as to move the same from one position to another without danger of disruption and without the accompanying danger of never being able to devise a launch-

ing apparatus which would operate to accomplish a successful launching of the same.

The plaintiff's novel method of attachments solved the problem. [Italics supplied.]

The dominant feature of the incorporation of the launching cables and the attachment of the concrete blocks thereto in such a manner as to provide an articulated concrete revetment which was practical and could be launched in an inexpensive and reliable manner solved the problem and was the primary cause for the extensive use of the Shearer type of articulated concrete revetment by the defendant.

10. Plaintiff has not manufactured nor sold revetments under the revetment patent and has not licensed others to manufacture, and there is therefore no loss of profits and no established royalty or license fee for the use of the invention.

11. The only other form of concrete revetment used by the defendant during the accounting period was that known as slab concrete. This included butt slabs and lapped slabs.

During the accounting period and as indicated in the following tabulation, the Government laid in the Memphis district 235,165 squares of slab concrete revetment at a total cost of $4,732,192.05, or at an average cost of $20.12 per square. As compared with the articulated concrete revetment covered by the Shearer patent in suit and laid by the Government during the accounting period at a total average cost of $14.10 per square (see Finding 7), this represents a difference in cost per square of $6.02.

Year	Number of squares	Total cost building and sinking
1923	909	$26, 348. 52
1924	1, 055	59, 505. 24
1927	1, 310	43, 268. 41
1928	13, 933	327, 114. 49
1929	28, 707	667, 827. 74
1930	46, 432	1, 078, 612. 81
1931	58, 521	1, 216, 428. 18
1932	82, 540	1, 072, 644. 52
1933	1, 758	240, 442. 14
	235, 165	4, 732, 192. 05

Reporter's Statement of the Case

12. A reasonable standard of comparison by means of which the Shearer inventions may be evaluated is the willow mat revetment. This was the revetment most extensively used by the Government during the accounting period and the next lowest in cost to the articulated concrete revetment. The Government made and sank 1,811,348 squares of willow mat revetment in the New Orleans, Vicksburg, and Memphis districts during the accounting period.

13. In order to arrive at a just comparison in the cost of the articulated concrete revetments and the willow mat revetments, and to eliminate as far as possible such variables as labor and material cost in different periods and at different localities, such comparison is limited to those revetments of both types laid in the same district and in the same fiscal year.

Such a comparison, which is made in the following table, gives a total cost per square for the articulated concrete mat of $13.31, as compared to $15.85 per square for the willow mat. Expressed in precentage, the articulated concrete mats averaged 84 percent of the cost of the willow mats.

Tabulation of Comparative Costs

District and fiscal year	Number of squares of articulated concrete	Cost of building and sinking	Number of squares of willow	Cost of building and sinking
Vicksburg:				
1917	8, 063	$57, 676. 04	54, 410	$388, 789. 24
1918	11, 383	109, 876. 78	25, 436	264, 384. 39
1919	4, 659	64, 207. 94	17, 350	220, 721. 16
1920	7, 452	165, 987. 20	32, 779	486, 447. 48
1921	4, 919	112, 054. 94	29, 394	574, 458. 16
1922	5, 516	61, 349. 66	34, 595	412, 598. 93
1925	14, 220	200, 508. 77	36, 621	747, 629. 17
1926	33, 778	537, 500. 64	20, 215	391, 147. 01
1927	31. 319	458, 877. 93	19, 761	321, 767. 72
1928	91. 474	1, 179, 471. 37	15, 966	330, 734. 38
1929	105, 746	1, 294, 080. 59	32, 543	695, 863. 33
1931	70, 504	719, 150. 42	1, 271	17, 349. 89
New Orleans:				
1929	12, 668	264, 590. 11	91, 016	1, 582, 433. 52
1930	51, 370	810, 075. 01	51, 505	909, 241. 30
1931	24, 062	419, 069. 87	26, 701	377, 482. 87
Memphis:				
1932	117, 269	1, 148, 676. 90	33, 314	467, 144. 60
1933	129, 159	2, 031, 025. 18	27, 365	533, 049. 42
Total	723, 561	9, 634, 179. 35	550, 242	8, 721, 242. 57

14. As set forth in Finding 7, there were 887,981 squares of articulated concrete revetment manufactured and sunk by the Government within the accounting period, at an average cost per square of $14.10. Application of the comparative average percentage value of 84 percent, as indicated in Finding 13, to this cost per square gives a resultant saving in cost of $2.68 [2] per square due to the Shearer inventions.

The Shearer revetment patent upon which this accounting is based relates to the manufactured article or mat, and the Shearer launching apparatus patent under which the Government is licensed relates to the mechanism or means for sinking the mats.

Of the total cost of the 887,981 mats manufactured and sunk by the Government during the accounting period, 39.6 percent is attributable to the cost of sinking and 60.4 percent attributable to the cost of manufacture.

A reasonable allocation of the savings of $2.68 per mat due to the Shearer inventions is 39.6 percent, or $1.06, to the launching apparatus patent under which the Government has a license, and 60.4 percent, or $1.62, to the revetment patent forming the basis of this accounting.

15. The willow mattresses used as the basis of comparison in Finding 13 are of two types: the fascine mattress and the frame mattress.

The fascine mattress consists of a series of round bundles of willow brush about 8 feet long and 12 inches in diameter, tightly compressed and wired together at intervals. The bundles of willow so formed are wired together in the form of a raft. In general, such a mat is constructed on a launching barge, being progressively launched in portions, the mat extending from the bank out in the river bed as far as may be desired.

A crew of men then load the mat with stone ballast consisting of pieces of stone as large as can be conveniently carried by one man, this being known as "one-man stone." This stone is scattered over the entire surface of the mat until its buoyancy is overcome. Thereafter barges are towed

[2] $\frac{14.10}{84} \times 100 - 14.10 = 2.68.$

over the sunken mat and additional stone ballast dropped into the water to hold the mat in position.

The frame willow mattress consists of a series of top and bottom frame members with willow brush filling compressed between them. The frame members are fastened together with wooden pins and wire nails. Poles are fastened to the top of the frame to separate the mattress surface into pockets in which the ballast or riprap is retained when the mattress is subsequently sunk.

The frame type of mattress is usually built on a riverbank and launched, after which it may to towed by a river steamer to the location in which it is to be sunk. It is thus readily adapted for use in locations more or less remote from willow growth. It is sunk in much the same manner as the fascine mattress by first overcoming its buoyancy and then loading it with additional stone or riprap.

16. Neither the willow mattresses nor the concrete mattresses are permanent. The average life of a revetment on the Mississippi River has been from two to eight years, although in individual instances the effective life may be much longer.

The life of a given revetment, either willow or concrete, depends upon the location at which it is placed, and its effective life is determined primarily by the attack of the river upon the revetment. Formation of sand bars in the river and erosion of the banks cause a constant shifting of the channel and act to change the angle of attack of the river upon a revetment located at a bend. The height of the water and the volume of water flow also alter the angle of attack. Such changes may either cause the revetment to be flanked [3] by the river at its upper end or flanked at its lower end by eddies caused by a change in the angle of attack.

On the other hand, a deposit of sand or silt may build up on the revetment and the course of the river so change that a revetment is not under any attack from the river either permanently or for a temporary period of time. The effective life of a revetment of either the willow or articulated

[3] A revetment is said to be "flanked" when the river gets in between the revetment and the bank it is intended to protect.

concrete type is predicated mainly upon the vicissitudes of the river rather than the materials from which the revetments are constructed. Attempts have been made to compare the efficiency of different types of revetment, but as the conditions for each bend of the river and each revetment constantly vary there is no satisfactory engineering data by which to establish the relative effective length of life of the articulated concrete type as compared with the willow type.

17. In the case of both the willow and the articulated concrete mat the metallic cables and wires which hold the willows and the concrete blocks together will corrode and ultimately give way. When this happens in the case of the articulated concrete mat the same then becomes an aggregation of separate concrete blocks, and these may stay in place, provided the attack of the river is not too severe and the river bed is not cut away by the action of the current flowing between the interstices separating the individual blocks.

When the fastenings fail in the willow mat the individual willows are released. Being buoyant, willows may rise and act as an obstruction, tending to set up eddies which disturb the stone or riprap covering and tend to pull it apart. The willows being of organic material are affected by exposure to the water and tend to become brittle over a period of years. In addition, that part of the willow mat near the water line suffers additional deterioration, in that portions of it may become alternately wet and dry as the river passes through low and high stages.

18. The articulated concrete mat manufactured and sunk in accordance with the Shearer inventions possesses an actual inherent advantage over the willow mat, in that it does not include in its construction any pieces of organic material which possess a natural buoyancy and may either deteriorate or become loose.

19. Maintenance of both willow and articulated concrete types of revetment consists mainly in laying new sections of mat over portions of the old where the old mat is being flanked by the river or holes have been formed in the mat by the attack of the current. As maintenance costs depend

primarily upon the severity of attack of the river on a mat, and in addition are dependent upon the extent of funds available for maintenance work in a given fiscal year, the comparison of maintenance figures shows largely the differing effect of the river upon the revetments and does not form a proper and sufficient basis for a mathematical calculation of either comparative maintenance costs or relative length of life of the two types of revetments.

20. Summarizing the advantages due to the use of plaintiff's inventions covered by the revetment patent and the launching apparatus patent and obtained by the Government in the manufacture and sinking of the 887,981 squares of articulated concrete mats, as compared to the willow mat, there exist two separate and distinct benefits, as follows:

(1) A reduction in cost of $2.68 per square (Finding 14);

(2) A mat constructed entirely of inorganic material and possessing no natural buoyancy in any of its constituent elements (Finding 18).

Other benefits which exist due to the use of the inventions in suit are too intangible to evaluate in terms of money.

21. A fair and reasonable monetary value to the Government of the benefit set forth in item 2 of the previous finding is the sum of thirty-two cents ($0.32) per square. Adding to this sum the savings in cost of manufacture and sinking per square of $2.68, a fair and reasonable total monetary value for the benefits derived by the United States from the two Shearer inventions is $3.00 per square.

A reasonable allocation of this sum between the launching apparatus patent and the revetment patent forming the basis of this accounting is 39.6 percent to the former and 60.4 percent to the latter, or the sum of $1.81 per square of articulated concrete.

22. A fair and reasonable figure upon which to base compensation to plaintiff is 20 percent of the monetary value of $1.81 to the Government from its use of the revetment patent or the sum of $0.36 per square.

The following tabulation shows the application of this sum to the 887,981 squares as applied to the squares of articulated concrete manufactured and sunk each fiscal year:

A Fiscal year	B Number of squares	C Base compensation at $0.36 per square
1917	8,063	$2,902.68
1918	11,383	4,097.88
1919	4,659	1,677.24
1920	7,452	2,682.72
1921	4,919	1,770.84
1922	5,516	1,985.76
1925	14,220	5,119.20
1926	33,778	12,160.08
1927	31,319	11,274.84
1928	91,474	32,930.64
1929	118,414	42,629.04
1930	124,780	44,920.80
1931	94,566	34,043.76
1932	134,752	48,510.72
1933	202,686	72,966.96
	887,981	319,673.16

23. A reasonable compensation to plaintiff for the use of his invention is the sum of $319,673.16. A reasonable amount to be added to make this amount "entire compensation" at the date of payment of judgment is interest at 5 percent per annum on the individual amounts set forth in column C of the tabulation in Finding 22 from July 1 of each corresponding year, given in column A, to the date of payment of the judgment, this amount not being added as interest but as a part of the just compensation.

The court decided that the plaintiff was entitled to recover the sum of ($319,673.16), with an additional amount measured by interest at the rate of 5 percent per annum on the following sums from the dates specified until paid:

$2,902.68 from July 1, 1917; $4,097.88 from July 1, 1918; $1,677.24 from July 1, 1919; $2,682.72 from July 1, 1920; $1,770.84 from July 1, 1921; $1,985.76 from July 1, 1922; $5,119.20 from July 1, 1925; $12,160.08 from July 1, 1926; $11,274.84 from July 1, 1927; $32,930.64 from July 1, 1928; $42,629.04 from July 1, 1929; $44,920.80 from July 1, 1930; $34,043.76 from July 1, 1931; $48,510.72 from July 1, 1932, and $72,966.96 from July 1, 1933.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This is a patent case now before this court for the determination of the amount of compensation to which the plain-

tiff Shearer is entitled. Plaintiff was in the employment of the United States at the time he made the inventions here in issue, and this case is before us under a special act of Congress (Private Number 285, 71st Congress). The act waived the statute of limitations and instructed the court first to determine whether the plaintiff Shearer was the first, original and sole inventor of the inventions described in three Shearer patents pertaining to concrete revetment construction, and if the court should find that he was such first, original and sole inventor, the court was, to quote that portion of the act relating more directly to the accounting,

> * * * then to determine, second, what amount of compensation, if any, he is justly entitled to receive from the United States for the use of his said inventions or any of them, since the date of said letters patent, up to the time of adjudication. In determining whether or not said David McD. Shearer is entitled to compensation and the amount of compensation, if any, for the use of said inventions the court shall take into consideration, if and so far as the facts may warrant, the facts, if proved, that while said David McD. Shearer, was engaged in perfecting the invention he was in the service of the United States as a junior engineer superintendent in charge of willow bank revetment construction under the Mississippi River Commission, and whether and, if at all, to what extent said inventions or any of them were discovered or developed during the working hours of his Government service, and to what extent his said inventions for protection of river channels and banks differ from the methods previously used, in material, method of laying, permanency, and value, and, whether if at all to what extent the expense of making experiments, trials, and tests for the purpose of perfecting said inventions was paid by the United States, and if any such expense was incurred by the United States, whether and, if at all, to what extent the United States received compensation for such expenses. * * *

In the trial of this case on the issues of validity and plaintiff's right to recover for use plaintiff withdrew any claim on account of Shearer patent 1,173,880, leaving for consideration patent 1,173,879 for an articulated concrete revetment structure, and patent 1,229,152 for an apparatus for launching and sinking concrete revetments.

The court in its special findings of fact and opinion of March 7, 1938 (87 C. Cls. 40), held that claims 3 and 6 of the Shearer revetment patent were valid, and the inventions defined thereby had been used by the United States and that their origin and development were such that plaintiff was entitled to compensation therefor under the special jurisdictional act. As to the launching apparatus patent, the court held that the plaintiff was estopped from compensation because the contribution of the United States toward the development of this invention and its reduction to practice was such as to give to the Government a shop right or nonexclusive license to use the same. In connection with the opinion of March 7, 1938, this case was referred to a Commissioner of this court to take testimony upon the question of reasonable and entire compensation as to the revetment patent, and it is now before the court on this question and on the objections of the parties to the Commissioner's report. The special act indicated that the amount of compensation be determined "since the date of said letters patent up to the time of adjudication." Therefore the accounting period is from February 29, 1916, to February 28, 1933, the date of expiration of the revetment patent.

Both parties have filed numerous exceptions to the Commissioner's findings. In general, plaintiff has excepted to the Commissioner's findings in so far as they have indicated what the plaintiff thinks is a small recovery. The defendant contends that the Commissioner reports an exorbitant recovery for plaintiff; that the Commissioner's basis for such recovery is predicated upon a false premise and not supported by the evidence, and that plaintiff is not entitled to any compensation or, at best, to a nominal one. It is unnecessary to refer to all of the numerous exceptions in detail except to say that we have considered them, together with additional proposed findings, and we will therefore limit our consideration to what we consider the basic issues.

Defendant's contention that plaintiff is entitled to no recovery is based upon what it calls "an inconsistency" in the court's former opinion (87 C. Cls. 40). That defendant made no motion for a new trial but waited from March 7,

1938, until the termination of a long and intricate patent accounting and now raises this issue for the first time, is contrary to orderly and expeditious procedure.

The alleged inconsistency as stated by the defendant is that the court, having held that the Government had an implied license under the Shearer launching barge patent, should have held also that the defendant had a right to use the revetment structure covered by the revetment patent.

Defendant bases its argument upon the principle that where the owner of a patent *grants or sells* to a licensee the right to use a patented machine, the grant carries with it, by necessary implication, a license under any other patent of the licensor which would be infringed by the operation of the machine. Such established principle is of itself sound and there are numerous cases which hold that one who has sold material or granted a license for a valuable consideration to another cannot prevent the buyer from making use of that which has been sold to him.

This principle, however, finds no application in the present situation, because Shearer did not sell or grant any license to the Government. This court in its former opinion merely held that Shearer was estopped to assert his launching apparatus patent because the details covered by the valid claims therein were developed at Government expense, the Government therefore inferentially obtaining a shop right or implied license to use the launching apparatus.

This case is one involving the apportionment of patent rights between employer and employee, pursuant to a special act which directed the court to take into consideration "* * * to what extent said inventions or any of them were discovered or developed during the working hours of his [Shearer's] Government service, and * * * to what extent the expense of making experiments, trials, and tests for the purpose of perfecting said inventions was paid by the United States * * *."

This case is therefore not the usual case involving a vendor and a vendee, and there is no inconsistency in the former opinion of this court, in holding that the plaintiff was entitled to recover on the revetment patent.

We next take up the Shearer revetment patent to which

the present accounting relates. While the plaintiff's developments, as compared to the background of the prior art, are set forth in much detail in the various findings of fact, a summarization appears to be necessary for a consideration of the remaining issues.

Revetments are structures that are subaqueous in character and are customarily sunk in a river over the underwater portion of the bank. They are usually located on a river bend, and their purpose is to prevent the river current, which impinges against the bend, from eroding the bank. They have been used extensively on the Mississippi River and the present accounting deals with revetments on that river. The best known and perhaps the oldest type of revetment is that known as the willow mat revetment. These consist of bundles of willow either woven or wired together in the form of a raft, which are placed in position and sunk by means of stone ballast scattered over the entire surface of the mat.

From time to time improvements have been attempted in revetment structures, and the use of concrete has been suggested in the prior art. In March of 1908 a Canadian patent was granted to Hawkes for an articulated concrete revetment. In its prior opinion and findings of fact this court referred to the Hawkes Canadian patent as the closest approximation in the prior art to the construction of the Shearer revetment patent. Hawkes disclosed a flexible reinforced concrete revetment mat formed of individual blocks each having its reinforcing wires extending beyond the blocks and formed into loops through which an anchor cable was passed.

The Hawkes structure would be effective once it was in place on the river bottom, and the court so found, but there was no disclosure of any launching cable or equivalent handling device incorporated in the structure by means of which the revetment could be placed.

This is borne out by subsequent developments and the record shows that a pamphlet entitled "Crown Flexible Rip-Rap—The Hawkes System" was received by Major Schulz of the United States Corps of Engineers, in 1910. Irrespective of whether Major Schulz obtained his original sugges-

tion from the Hawkes disclosure, the Government had Major Schulz conduct experimental work from 1910 to 1912 with articulated concrete mats referred to as the "Schulz construction." (See Finding 8.) These mats were similar to the Hawkes construction in that they were flexibly connected to each other by means of pins, bolts, or an anchor cable extending through the eyes of adjacent blocks.

The experiments were limited to the use of the mats either on the river bank above the water line or in very shallow water immediately adjoining. In the first instance, the blocks were placed *in situ* and then subsequently linked together, and in the latter instance they were placed on planks extending some 10 or 12 feet out from the river bank. When the blocks had been placed in position and had been connected together, the barge was then pulled out into the river, permitting the planks and blocks to fall into the water.

Major Schulz, when testifying in the case, when asked if this was a convenient way of launching mattress, answered, "It was practically the only way I knew of." The Government spent some $26,500 on these experiments and then abandoned them.

The Schulz construction, however, was described in a printed publication, "Engineering Record," of June 7, 1913, and therefore became a part of the prior art. This publication was listed in Finding 36 of the court's former findings of fact and was considered by the court at that time, for the initial sentence of Finding 37 states as follows:

> Of these publications and patents mentioned in the foregoing finding, the Canadian patent to Hawkes No. 110,571 (defendant's exhibit 97) is the closest approximation in the prior art to the construction of the patent in suit.

Other than the Schulz experiments just referred to, the only form of concrete revetment used by the defendant was that known as "slab concrete," in which a plurality of monolithic concrete slabs was separately placed in final position, either abutting or overlapping each other. The cost of building and sinking a unit of this type of revetment, however, was much higher than the cost of similar sized units of either

the articulated concrete or the willow mat revetment. (See Finding 11.)

As compared to the background of prior art just discussed, the record tells a different story with respect to the Shearer construction. On or about October 6, 1914, the plaintiff submitted to the district engineer officer an exact and detailed description regarding the method of constructing concrete mats and mattresses, apparatus for their molding, and the mechanism for their launching, together with a discussion as to their availability for subaqueous revetments instead of fascine mattresses. Experiments were begun with the Shearer type of revetment in 1915, and the ultimate result was that between February 29, 1916, the date of issuance of the Shearer revetment patent, and February 28, 1933, the date of its expiration, the Government saw fit to use on the Mississippi River 887,981 squares of articulated concrete revetment of this type at a total cost or investment of $12,524,-620.40. These figures, obtained during the accounting, amplify the correctness of the court's former opinion and its former findings of fact in which the court stated, with respect to the revetment construction covered by the claims in suit of the Shearer revetment patent, that it "was capable of being launched in an inexpensive, relatively quick, and completely reliable manner, even in strong currents and deep water, whereas those of the prior art were not."

We have made this comparison not for the purpose of sustaining validity, which we have already determined, but in connection with the method used in the accounting and to which defendant objects. The defendant urges that the Shearer revetment patent was not for an articulated concrete mat *per se*, but that his invention was merely an improvement over the prior art mat such as the Hawkes mat, and that it only consisted in the improved method of attaching the launching cables to the concrete blocks. On this basis defendant urges that plaintiff has ignored the established rule of apportionment, which places upon a plaintiff in a patent accounting the burden of apportioning the value of that part of the structure covered by his invention as against that which was open to defendant to use, and that

plaintiff having failed to properly apportion the value of the cables and their attachment to the launching blocks, has failed to establish a satisfactory basis for an accounting.

While we have used apportionment in the accounting as between the revetment patent and the launching apparatus patent, to which the defendant contributed, we do not think that the apportionment rule applies to the groups of elements specified in claims 3 and 6 of the Shearer revetment patent. These claims cover a novel combination of elements, even though some of them are individually old. There is here no basis for an attempt to segregate patented elements from unpatented elements. The pith of the invention is the entire cooperative combination and not some special details of construction. The Hawkes mattress was not of any value to the Government because its construction was such that it could not be laid in deep water and swift current. The combination of elements expressed in the claims of the revetment patent, to quote from our former opinion in this case, "solved the problem" and thus enabled subaqueous articulated concrete revetments to be used.

This case therefore comes within the entire value rule in which the salability or utility of an article is primarily due to the improvement imparted to the combination. See *Hurlbut* v. *Schillinger*, 130 U. S. 456; *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441; *Piaget Novelty Co.* v. *Headley et al.*, 123 Fed. 897.

In the *Hurlbut* v. *Schillinger case*, above cited, the patent was directed to a concrete pavement laid in detached blocks or sections, so that one section could be removed without disturbing the adjacent sections. Concrete pavements were in themselves old, but the Supreme Court said, with respect to the sectionalizing of concrete pavements that—

> The invention of Schillinger was a very valuable one. The evidence is that it entirely superseded the prior practice of laying concrete pavements in a continuous, adhering mass. * * * It clearly appears that the defendant's concrete flagging derived its entire value from the use of the plaintiff's invention, and that if it had not been laid in that way it would not have been laid at all.

The method of computation herein used in arriving at a reasonable compensation consists in (1) arriving at an average monetary advantage per square of articulated concrete fabricated and sunk during the accounting period; (2) apportioning such monetary advantage between the revetment patent here in issue and the launching apparatus patent which the Government by virtue of its contribution is entitled to use, and (3) ascertaining from the total monetary value of the revetment patent to the Government what proportion thereof constitutes a just and reasonable compensation to plaintiff. See *Olsson* v. *United States*, 87 C. Cls. 642, 659, quoting from *Mamie C. Wood et al.* v. *United States*, 36 C. Cls. 418, 426:

> But this court, in the leading *Case of McKeever*, (14 C. Cls. R., 396; affirmed by the Supreme Court, see 18 id., 757), laid down a sufficient rule for such cases. The question to be determined is, What was the invention worth in the market? What would the parties have taken and paid if the matter had come to an express agreement? What would any person needing the invention have been willing to pay for it? * * *

See also Robinson on Patents, Vol. III, sec. 1062—

> There is no presumption, either of law or fact, that the plaintiff has lost all that the defendant has gained, or that the defendant's advantage is equal to the plaintiff's loss. But the pecuniary benefit which the defendant has derived from the unlawful use of the invention, whether by an increase in the quality of his products and the quantity of his sales, or by a decrease in the expense of manufacture, is a fact from which, in connection with other facts, the jury may infer the amount by which the plaintiff's sales and prices have been reduced through the infringement.

The standard of comparison used in the present case is the willow mat revetment which is the type most extensively used by the Government during the accounting period and which also is next lowest in cost to the concrete revetment. A stipulated set of figures giving the number of squares of each type of revetment, their cost of fabrication and their cost of sinking in the various districts on the Mississippi River, on an annual basis, forms the basis for the comparison.

In order to arrive at an average relative cost value between the willow mat and the concrete revetment, a comparison has been made in a tabulation contained in Finding 13. This comparative tabulation is limited to those revetments of both types laid in the same district and in the same fiscal year, thus limiting as far as possible annual variations in labor costs, and material costs. The costs during the accounting period for each type of revetment have been totalled and divided by the number of squares, and show by comparison that the articulated concrete revetment averaged 84 percent of the cost of the willow mats during the entire accounting period.

Both the defendant and plaintiff object to this method of obtaining the comparative cost. Defendant urges that such tabulation should also contain cost figures for years and districts in which willow mats were laid and no concrete mats were made, or vice versa. This, in our opinion, does not give as true a comparison as the one which we have utilized and which tends to limit variations in both labor and material costs. Plaintiff, on the other hand, urges that the comparison should be limited to figures involving the same number of mats in a year. As illustrative of plaintiff's suggested method, 8,063 concrete mats were laid in the Vicksburg District in 1917 at a cost of $57,676.04 and in the same year and the same district 54,410 willow mats were laid at a cost of $388,789.24. Plaintiff urges a comparison which would only involve 8,063 willow mats. Needless to say, defendant's suggested method would lower the comparative cost ratio between the concrete and willow mats, and plaintiff's suggested method would raise the cost ratio. We think it to be correct, for the purpose of obtaining merely an average relative cost for the entire accounting period, to make our comparison on what was actually done and to the cost and number of mats actually laid in the same year and in the same district.

As set forth in the tabulation in Finding 7, the Government laid during the accounting period a total of 887,981 squares of articulated concrete revetments at a total cost of $12,524,620.40 or at an average cost of $14.10 per square. Application of the comparative percentage value of 84 per-

cent to this cost per square gives a resultant saving in the combined cost of manufacture and cost of sinking of $2.68 per square due to the use of the Shearer revetment patent and the Shearer launching apparatus patent. Due to the inherent advantages of the concrete mat over the willow mat and its lack of inorganic and buoyant material (see Findings 17 to 20) we have added to this savings in cost, the sum of 32 cents per square, thus giving a fair and reasonable average total monetary value per square for the benefits derived by the United States of the two Shearer inventions of $3.00 per square.

The tabulation given in Finding 7 shows an average relationship throughout the accounting period between the cost of fabrication of the mats and the cost of sinking the mats of 60.4 percent to the cost of fabricating and 39.6 percent to the cost of sinking. Using these same figures as a basis for apportionment of the $3.00 per square as between the revetment patent and the launching apparatus patent, which the Government by virtue of its contributions is entitled to use, we arrive at the sum of $1.81 per square of articulated concrete revetment as the average monetary advantage to the Government due to the revetment patent.

Upon the record in this case, we are of the opinion that a fair and reasonable compensation to plaintiff should be based on 20 percent of $1.81 per square, or the sum of $0.36 per square. This value, as applied to the 887,981 squares used during the accounting period results in the sum of $319,673.16, and constitutes a reasonable and entire compensation to plaintiff for the use by the United States of the Shearer revetment patent, together with interest at 5 percent on this amount, not as interest but as part of the just compensation, this interest to be calculated in accordance with the periods and amounts specified in the tabulation in Finding 22.

In its former decision in the present case (87 C. Cls. 40) the court held that—

> The report of the Committees having under consideration the special act in this case indicates that Congress intended no more than to refer the case to this court to be adjudicated as other patent cases are under patent law.

Interest is therefore included not as interest but as part of the entire compensation in accordance with *Harry F. Waite* v. *The United States*, 69 C. Cls. 153; 282 U. S. 508.

Judgment is rendered accordingly. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

WILLOW RIVER POWER COMPANY, A WISCONSIN CORPORATION, v. THE UNITED STATES

[No. 45067. Decided February 7, 1944]*

On the Proofs

Navigable stream; taking; damages; navigability a Federal question. In a suit for damages on account of a taking by the Government the navigability of a river is a Federal question, and Federal courts are not bound by the decisions of State courts. *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, 123; *United States* v. *Holt State Bank et al.*, 270 U. S. 49, 56.

Same.—Under the decisions of the United States courts the mere fact that logs are floated downstream in times of high water does not make the river navigable in the sense that the United States under its commerce power has paramount rights in the stream in the interest of navigation. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 698–699; *United States* v. *Utah*, 283 U. S. 64, 87.

Same; navigability is a question of fact.—Whether or not a stream is navigable is a question of fact. *The Daniel Ball* v. *United States*, 10 Wall. 557; *United States* v. *Utah*, 283 U. S. 64.

Same; proof insufficient to establish navigability.—In the instant case, it is *held* that the proof is entirely insufficient to show that the river in question, the Willow River, in its ordinary condition or with artificial aids, is suitable for commercial navigation. *The Daniel Ball* v. *United States*, 10 Wall. 557; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377.

Same; high watermark; liability of Government.—The Government has the right by the erection of dams to raise the river level to ordinary high watermark with impunity but is liable for the taking or deprivation of such property rights as may have resulted from the raising the level beyond that point. *Kelley's Creek & Northwestern Railroad Co.* v. *United States*, 100 C. Cls. 396.

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*Defendant's motion for new trial overruled May 1, 1944.
Defendant's petition for writ of certiorari pending.

Same; recovery as for a taking on account of decrease of head of plaintiff's dam.—Where no portion of plaintiff's property was taken but the erection of a dam by the Government decreased the head of plaintiff's dam, plaintiff is entitled to recover as for a taking. *United States* v. *Cress*, 243 U. S. 316, 329, 330, cited.

Same; just compensation; capitalization of annual revenue.—The amount of just compensation to be awarded may not include one factor to the exclusion of all others, and among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost by reason of the reduction of power caused by the backing up of water into the tailrace of plaintiff's dam.

The Reporter's statement of the case:

Mr. R. M. Rieser for the plaintiff. *Mr. John Wattawa* and *Rieser & Mathys* were on the briefs.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Willow River Power Company, is a public utility company of the State of Wisconsin. During the times here involved it developed electric power hydraulically and by other means and sold it to the surrounding community. Its power plant was located near the confluence of the Willow River and the St. Croix River, in the city of Hudson, Wisconsin, on land owned by it above ordinary high water of the St. Croix River.

2. Willow River is a nonnavigable stream in the State of Wisconsin and enters the St. Croix River at Hudson. The St. Croix River is a navigable stream, in its lower reaches forming the boundary between Wisconsin and Minnesota. It enters the Mississippi River, also a navigable stream, at Prescott.

In times past logs were boomed down portions of the Willow River in times of spring freshets by means of dams and sluices. This industry has long since been abandoned. Dams erected for that special purpose were in course of time succeeded by dams erected for the single purpose of developing electric power hydraulically.

3. The plaintiff operates four such plants on the Willow River.

Beginning near the mouth of the river, at Hudson, is a plant which, before the cause of action here complained of, had a maximum head of 22½ feet, known as the St. Croix plant, and is the plant here in controversy. It has two 150-kilowatt generators attached to vertically operated turbines.

The next one upstream is the Little Falls plant, with a maximum head of 22 feet and a unit of 300 kilowatts.

The third one in order is the Willow Falls plant, with a maximum head of 107 feet, with two 300-kilowatt generators.

The fourth one upstream is the Mounds plant, with a head of 50 feet and a 180-kilowatt generator.

These four plants form a system and are operated by plaintiff as such.

None of the dams has locks or sluiceways, and none is provided with passage for any form of vessel.

The dam at the St. Croix plant is the oldest of the dams and was erected in the latter part of the 19th century.

4. The St. Croix River enters the upper Mississippi at Prescott, and from Prescott to slightly beyond Stillwater on the St. Croix, upstream from the junction of the Willow River and the St. Croix River, the St. Croix is in the form of a greatly elongated lake.

Pursuant to Congressional authorization, defendant erected near Red Wing, Minnesota, a dam designated No. 3 and hereinafter termed the "Red Wing Dam." The pool created above the dam had an ordinary height of 675 feet above mean sea level and extended up the Mississippi and to Stillwater on the St. Croix River, or beyond plaintiff's St. Croix plant.

The pool was created by the Red Wing Dam August 12, 1938.

Where the waters of Willow River empty into Lake St. Croix through the St. Croix plant, the ordinary level of Lake St. Croix after the erection of the Red Wing Dam was approximately 675.3 feet.

The Red Wing Dam may be operated in such manner that in times of flood the current may be allowed to flow as under natural conditions, except for a slight swell. It is

located about 15 miles downstream from the junction of the St. Croix and Mississippi Rivers. Hudson is about 15 miles upstream on the St. Croix River from Prescott.

5. Before creation of the pool back of the Red Wing Dam the ordinary high-water level of Lake St. Croix at plaintiff's St. Croix plant was 672 feet mean sea level. The Red Wing pool did not affect the levels of Willow River, but it did raise the ordinary high-water mark of Lake St. Croix at plaintiff's St. Croix plant about 3 feet, raising the water level in the tailrace of plaintiff's plant by that amount, which decreased the head of plaintiff's dam by 3 feet. This diminished plaintiff's hydroelectric power at the St. Croix plant. The head above ordinary high water before the erection of the Red Wing Dam was 17 feet.

In order to make up this deficiency plaintiff entered into a contract with Northern States Power Company, October 10, 1938, whereby the Northern States Power Company agreed to supply electric current to the plaintiff "to the extent of Five Hundred (500) Kilowatts of Demand, for Customer's [plaintiff's] use for light, heat, and power, for public and private use in the communities and rural areas now served from Customer's transmission and distribution system," the energy thus supplied to be used as auxiliary to the plaintiff's own generating facilities. A copy of this contract is marked in evidence as plaintiff's exhibit "S" and is made a part hereof by reference.

This energy was to be delivered to plaintiff at the plant of the Northern States Power Company. In order to transmit it to plaintiff's plant it was necessary to build a transmission line, which was done at a cost of $21,000.

6. The value of the loss in power as a result of the raising of the level of the St. Croix River by 3 feet above ordinary high water was $25,000 at the time and place of taking.

7. The plaintiff abandons its claim with respect to destruction of site for a dam and possible waterpower head on the Apple River, and no findings in connection therewith are made.

The court decided that the plaintiff was entitled to recover the sum of $25,000, with an additional amount measured by

interest at the rate of four and one-half (4½) percent per annum on $25,000 from August 12, 1938, to the date of payment of the judgment, not as interest but as a part of the just compensation.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This is a suit to recover for the loss of the power capacity of plaintiff's dam on the Willow River caused by the erection by the defendant of the Red Wing Dam on the Mississippi River. Plaintiff's hydroelectric power plant was at the mouth of the Willow River, which river empties into the St. Croix River. The St. Croix is a tributary of the Mississippi River and is a navigable stream. Plaintiff's dam and power plant was on land owned by it above ordinary high water, but the tailrace from its plant emptied into the St. Croix River below ordinary high water. As the result of the erection by the defendant of the Red Wing Dam on the Mississippi River the water level of the St. Croix River was raised and backed up into plaintiff's tailrace.

The case presents several issues, the first of which is whether or not the Willow River is a navigable stream. If it is a navigable stream, then plaintiff's rights in its dam and power plant were subject to the paramount right of the defendant to take all necessary measures to improve navigation. *United States* v. *Chandler-Dunbar*, 229 U. S. 53, 62; *United States* v. *Chicago, Milwaukee, St. Paul, & Pacific Railroad Co.*, 312 U. S. 592, 595.

The Supreme Court of Wisconsin, in *Willow River Club* v. *Wade*, 100 Wis. 86; 76 N. W. 273, held that this river was a navigable stream. The Willow River ran through the property of the plaintiff, Willow River Club. The action was brought to recover damages alleged to have been suffered by the plaintiff by the catching of fish in that part of the Willow River which ran through its property. Under the Wisconsin law, if the river was navigable, then the defendant had the right to catch fish in any part of the river, because the title to the bed of navigable streams was in the State. The court held that it was navigable and denied recovery. The stream was held to be navigable because the proof showed that a long time previously logs had been floated down the river in times of spring freshets. This was the only proof that the

river had ever been used, or in its natural state was capable of use, for commerce and the transportation of persons and property.

However, in a later case the Wisconsin Supreme Court rejected this as a test of navigability in a case involving the right of the defendant to construct a dam across one of the rivers of the State. The Mill Dam Act (chapter 146, Statutes of Wisconsin, 1898) permitted the erection of dams on non-navigable streams but prohibited their erection on navigable streams without the consent of the State. The proof in that case (*Allaby, et al.* v. *Mauston Electric Service Co.*, 135 Wis. 345, 351; 116 N. W. 4, 6) showed that logs had been floated down the stream in question, but the court said:

> * * * From these considerations we are constrained to the conclusion that the testimony which tended merely to show that this stream was so capable of floating logs that the public might be entitled to right of highway therein for that purpose was wholly insufficient to establish that it was navigable within the meaning of chapter 146.

The decision in this case weakens the authority of the decision in *Willow River Club* v. *Wade*, *supra.*

However, in a suit such as the one in the case at bar, navigability is a Federal question, and Federal courts are not bound by the decisions of State courts thereon. *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, 123; *United States* v. *Holt State Bank, et al.*, 270 U. S. 49, 56.

Under the decisions of the United States courts it is clear that the mere fact that logs are floated down a stream in times of high water does not make the river navigable in the sense that the United States under its commerce power has paramount rights in the stream in the interest of navigation. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 698–699; *United States* v. *Utah*, 283 U. S. 64, 87.

There has been no decision of a Federal Court on the navigability of the Willow River. Whether or not it is navigable is a question of fact. *The Daniel Ball* v. *United States*, 10 Wall. 557; *United States* v. *Utah*, *supra.*

We are clearly of the opinion that the Willow River is not a navigable stream in the sense that the United States may regulate commerce thereon. There is no commerce thereon to be

regulated and there never has been. The only transportation the river has ever afforded is to float down logs in times of spring freshets. Except at these times logs cannot be floated down the river. The river is but 40 miles long in a straight line and 70 miles long following its meanders. In some places it is so narrow that the branches of trees on one bank are interlocked with the branches of trees on the other bank. The depth of the water varies from 2 inches to 12 or 14 inches. Fencing extends across the stream in agricultural areas. The stream has never been meandered by the Government. Since the erection of dams by the plaintiff the pools created by them are used for recreational purposes only. The proof is entirely insufficient to show that the river in its ordinary condition or with artificial aids is suitable for commercial navigation. *The Daniel Ball* v. *United States*, *supra; United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377.

Liability of the defendant, therefore, depends upon whether or not the level of the St. Croix River was raised above ordinary high-water mark. It had a right to raise the level of the river to ordinary high-water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point. *Kelley's Creek & Northwestern Railroad Co.* v. *United States*, No. 44631, 100 C. Cls. 396, and cases there cited.

The proof shows clearly that the ordinary level of the St. Croix River was raised to 675 and a fraction feet. The plaintiff says that ordinary high-water mark before the level was raised was at elevation 672 feet, and the defendant says it was 676 feet. We are satisfied from the proof that it was not higher than 672 feet.

The plaintiff has introduced numerous photographs showing large trees standing in the water after the raising of the level. These are standing in depths of water varying from 1.2 feet to 4.7 feet. This was at a time when the level of the river was at its ordinary level of 675.3 feet. The defendant itself introduced hydrographs showing the levels of the river at Hudson, where plaintiff's plant was, and at Stillwater, some miles upriver from plaintiff's plant,

and at Prescott, where the St. Croix empties into the Mississippi. The hydrographs at Hudson begin in May of 1936. An examination of these hydrographs shows spring floods beginning in March or April and lasting through June and into July. After the subsidence of these floods these graphs show that the river maintained a level varying between 667 feet and 670 feet until the erection of the Red Wing Dam on the Mississippi River on August 12, 1938, since which time the graphs show that the ordinary level of the river is at about 675 feet. In November of 1939 the gates in the Red Wing Dam were opened, and the graphs show that during the period they were open the level of the river fell from 675 feet to 672 feet. There is no doubt in our minds that plaintiff's experts are correct in their testimony that the ordinary high-water mark before the erection of the Red Wing Dam did not exceed 672 feet.

The defendant says that it did not take any portion of plaintiff's property, that it merely decreased the head of plaintiff's dam, and that plaintiff is not entitled to recover therefor as for a taking. This position, however, is contrary to the decision of the Supreme Court in *United States* v. *Cress*, 243 U. S. 316, 329, 330. Two cases were discussed in that opinion. With reference to No. 718 the court said:

> In No. 718 there is a contention that, because the backwater is confined to Miller's Creek, it does not amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the mill dam that was essential to the value of the mill; or, as the findings put it, "The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill." Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land.

The authority of this case is somewhat weakened by the court's opinion in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, *supra*, in which the court said, "What was said in the *Cress* case must be confined to the facts there disclosed"; but the facts of that case on this point are identical with the facts here. The case has not been overruled and we have no option but to follow it. It results that plaintiff is entitled to recover the value of the decrease in the head of its dam.

The exact determination of that value is difficult from the proof introduced. We are furnished with involved calculations, such as we might expect and perhaps have a right to expect from engineers specializing in hydroelectric fields. But the amount of just compensation to be awarded may not include one factor to the exclusion of all others—it is a far more complex proposition than, say, the mere ascertainment of quotations on the exchange, usual returns on investments, or mathematical formulae. *Hetzel* v. *Baltimore & Ohio R. Co.*, 169 U. S. 26; *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359; *Story Parchment* v. *Paterson Paper Company*, et al., 282 U. S. 555.

Among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost by reason of the reduction of power caused by the backing up of water into the tailrace.

Taking all relevant proof into consideration, we have arrived at an amount of $25,000, by way of a jury verdict, as justly compensating the plaintiff for that which the defendant has taken from it, as of the time and place of taking, adding thereto and as a part thereof 4½ percent per annum on $25,000 from August 12, 1938, down to the date of payment of judgment.

Judgment is rendered accordingly. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

INTERNATIONAL SILVER COMPANY, A CORPORATION v. THE UNITED STATES

[No. 44107. Decided March 6, 1944]

On the Proofs

Increased labor costs due to enactment of National Industrial Recovery Administration Act not recoverable.—Proof held to be insufficient to show increased labor costs of performing contract with Government due to the enactment of the National Industrial Recovery Administration Act.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for the plaintiff. *Messrs. Rhodes, Klepinger and Rhodes* were on the brief.

Mr. J. J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business at Meriden, Connecticut.

2. On August 9, 1933, pursuant to a bid made on June 30, 1933, the plaintiff entered into a contract with the defendant to furnish and deliver to the Navy Yard, Brooklyn, New York, designated articles of silver-plated tableware at the bid unit prices.

On September 14, 1933, the parties to the agreement of August 9, 1933, without further consideration, entered into another agreement whereby plaintiff agreed to perform the contract of August 9, 1933, in full compliance with and under the stipulations of the provisions of an Executive Order dated August 10, 1933, that every contract for supplies should provide and require that:

(*a*) The contractor shall comply with all provisions of the applicable approved code of fair competition for the trade or industry or subdivision thereof concerned, or, if there be no approved code of fair competition for the trade or industry or subdivision thereof concerned, then with the provisions of the President's Reemployment Agreement promulgated under authority of Sec-

tion 4 (a) of the foregoing act [Act approved June 16, 1933 (48 Stat. 195), entitled "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes"], or any amendment thereof, without regard to whether the contractor is himself a party to such code or agreement;

Provided, That where supplies are purchased that are not mined, produced, or manufactured in the United States the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

(*b*) If the contractor fails to comply with the foregoing provision, the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract, and purchase in the open market the undelivered portion of the supplies covered by the contract, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

3. On October 3, 1933, goods of a total value of $4,384.85 had been delivered. The balance of $310.80 had been delivered on December 7, 1933.

4. On December 15, 1934, the plaintiff submitted to the Bureau of Supplies and Accounts, Navy Department, a claim for relief under the Act of Congress approved June 16, 1934 (48 Stat. 974), claiming increased costs as follows: labor, $202.69; material, $18.16; overhead, $316.43, total, $537.28. The claim was transmitted to and considered by the Comptroller General of the United States, who October 14, 1935, in final action thereon, denied relief on the ground that plaintiff had not complied with the requirements of the Act of June 16, 1934.

5. The Silverware Manufacturers' Institute, of which the plaintiff was a member, adopted a code of fair competition August 2, 1933, and submitted it to the Administrator of the National Industrial Recovery Administration August 4, 1933. It was considered by the Administrator, revised, and as revised submitted to the President for approval, and approved by the President December 23, 1933, to go into effect December 25, 1933.

6. On July 27, 1933, the President called upon employers to sign the President's Reemployment Agreement. This

agreement provided for a maximum work week of 40 hours and for a minimum wage of 40 cents per hour, and for an equitable readjustment of all pay schedules which were in excess of the minimum. The plaintiff did not sign this agreement, but on August 1, 1933, the plaintiff gave notice to its employees that, "In an endeavor to effectuate the intent of the National Industrial Recovery Act and indicate our desire to cooperate in promoting the wishes of President Roosevelt, to increase employment and purchasing power, the International Silver Company will operate all plants, branches and offices under the code which will be presented by the Silverware Manufacturers' Institute, and maximum hours and minimum rates will conform thereto." This policy was put into effect August 7, 1933, and plaintiff thereupon observed the code which eventually was approved by the President.

On August 7, 1933, the plaintiff put into effect an increase in wages, whereby no wages less than the minimum of 35 cents provided for by the Code were paid, and the wages of all day and piece workers above the minimum were increased by approximately 15 percent.

7. Plaintiff destroyed its old cost production records as soon as there was a change affecting the cost, substituting therefor new records. After the time the bid for this contract was made and up to the date testimony was taken in this case there had been quite a number of changes, estimated at 12 changes, in plaintiff's cost production records and, hence, the cost production records, upon the basis of which plaintiff's bid was made, were not available at the time of taking testimony and had not been available for a number of years.

The proof is insufficient to show the increased cost of performing the contract as a result of the enactment of the National Industrial Recovery Act and the signing of the Code adopted in pursuance thereof.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover increased costs due to the enactment of the National Industrial Recovery Act. It en-

tered into a contract with the defendant on August 9, 1933, to furnish certain silver-plated tableware. Later, on September 14, 1933, the parties entered into a supplemental contract, under which the contractor was required to comply with the applicable approved codes of fair competition, or if none had been adopted, with the President's Reemployment Agreement.

The plaintiff did not sign the President's Reemployment Agreement and did not put its provisions into effect, but on August 7, 1933, it did put into effect the provisions of the Code adopted on August 2, 1933, by the Silverware Manufacturers' Institute, although this Code was not approved by the President until December 23, 1933, and did not go into effect until December 25, 1933. This Code established a minimum wage of 35 cents an hour. In pursuance to the Code, the plaintiff increased all wages below the minimum rates to the minimum rate established, and increased all day and piece-work rates in excess of the minimum rates by 15 percent. This was effective on August 7, 1933.

Plaintiff's proof is insufficient to show the extent of the increase in its cost of performing its contract with the defendant as the result of the passage of the National Industrial Recovery Act.

As stated in the findings, all of its old cost records pertaining to this contract had been destroyed and were not available to show the actual increase in cost. In an effort to prove the increase, plaintiff introduced in evidence the claim it filed with the Comptroller General under the Act of June 16, 1934, and its accountant's figures upon the basis of which this claim was made; but the accountant who figured and prepared the claim was not called to the stand to verify the claim or his figures. (The proof shows that at the time of the taking of testimony the accountant was permanently and totally disabled and he was perhaps not available as a witness.)

In the absence of testimony verifying the claim and the computation, they cannot be received as proof of the facts shown thereon. There has been no opportunity for cross-examination of the party who made the figures and prepared

the claim. His figures show the estimated cost and the actual cost. The difference between the two is the amount claimed; but we are not informed by the evidence of the basis upon which the estimate was made. He figures, for instance, an hourly rate for labor of 49.5 cents, but whether or not these are the wages paid all the workmen who worked on this contract, or an average wage, does not appear. Presumably, all of those who worked on the contract were not paid exactly the same wage.

Nor does it appear whether or not this figure is the actual wage which plaintiff was paying at the time or whether it was the wage which the accountant figured they would have to pay. In all probability it was the latter, as appears from the following: As stated in the findings, the President's Reemployment Agreement was promulgated on July 27, 1933. This agreement called for a maximum work week of 40 hours per week, for a minimum wage of 40 cents an hour and an equitable adjustment in wages which were above the minimum. Plaintiff's bid was not made until after the promulgation and publication of this request on the part of the President. In addition, for at least two weeks prior to the time the bid was made plaintiff's officers had been attending meetings of the silverware industry for the purpose of formulating a Code for this industry. At these meetings there was constant discussion of the necessity for increasing wages and shortening hours. So that plaintiff knew that there was a lively prospect of the necessity for increasing wages and shortening hours. Whether or not the accountant took into consideration this possibility, we do not know. There is some indication that he did, because the contract was not signed until more than a week after plaintiff had given notice to all of its employees that it would increase wages to a minimum of 35 cents an hour in accordance with the provisions of the Code agreed upon by the silverware industry, and that it would increase by 15 percent all wages in excess of this minimum. So, when plaintiff signed the contract it knew that the amount it would have to pay its laborers in performing the contract would be increased by about 15 percent; but it signed it without protest

or without even mentioning the fact that the cost of performing it would be more than it had anticipated. This would indicate that when plaintiff submitted its bid, it took into account some increase in the wages it was then paying.

It also appears from the accountant's figures that several items were included in the claim presented, the alleged increase in which could not have been a result of the National Industrial Recovery Act, if in fact there was any increase in these items at all. Included in the claim is an increase in the selling and distributing expenses, administrative expenses, and manufacturing "burden" or overhead, the latter of which includes, as the testimony shows, light and power. Any increase in these items could hardly have been the result of the passage of the National Industrial Recovery Act.

Independent of the ordinary rules of evidence, it is manifest that the computation of the accountant and the claim presented cannot be relied upon as proof of the increase due to the passage of this Act.

Plaintiff also undertook to prove the increase by taking the cost production records of 1940, and from them figuring what the cost would have been at the time the bid was submitted. This computation took into account the general increase in wages of 15 percent on August 7, 1933, and another general increase of 10 percent on April 16, 1934, and another of 5 percent on January 4, 1937. But the testimony shows that in the meantime there had been a number of other changes in cost production which were not taken into account. Plaintiff's witness admitted that these changes in costs might have included changes in the cost of labor as well as other items. It is clear, therefore, that any computation which takes into account only three changes in labor costs, when there were probably others, cannot be relied upon to establish the increase in cost. This computation also took into account an increase in the cost of manufacturing "burden" a number of items of which could hardly have been affected by the passage of the National Industrial Recovery Act. The witness who made the computation admitted that it was "merely a guess on my part."

This testimony also fails to prove the increase in cost in

the performance of the contract brought about by the passage of the National Industrial Recovery Act.

Due to the destruction of plaintiff's records, from which the cost of production prior to the passage of the National Industrial Recovery Act and the increase in cost due to its passage could have been shown, plaintiff has been unable to prove its case.

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

LOUIS TOWNSLEY v. THE UNITED STATES

[No. 45097. Decided March 6, 1944]*

On the Proofs

Overtime pay; wages of Canal Zone employee under Section 23 of the Act of March 28, 1934, employed on monthly pay basis.—Where plaintiff, an employee of the Panama Canal, was employed and paid on a monthly basis, working 8 hours per day, 6 days a week; it is *held* that under Section 23 of the Act of March 28, 1934 (48 Stat. 522), 40 hours per week was set as the regular work period for plaintiff's job and payment of time and a half for overtime was directed under the statute, and accordingly plaintiff is entitled to recover on the basis of time and a half for plaintiff's sixth day of work in each week throughout the period of his employment.

Same; erroneous inference from ruling of Comptroller General.—There is nothing in the language of Section 23 of the statute (48 Stat. 522) which sustains the inference from the ruling of the Comptroller General (14 C. G. 156–165) that its provisions for overtime pay did not apply to employees hired and paid on a monthly basis.

Same; intent of Congress.—It was not the intention of Congress to deny the benefits of the shorter week, or, if a longer week was worked, the usual and conventional rate of overtime pay, to workmen such as plaintiff, just because they were paid by the month.

*Defendant's petition for writ of certiorari pending.

Same; intention of the 1934 Act.—Section 23 of the statute (48 Stat. 522) was intended to apply to those trades and occupations whose compensation was not fixed by the Classification Act of 1923 (42 Stat. 1489) but whose compensation was "set by wage boards or other wage-fixing authorities" after comparison with wages paid the same trades in nongovernment work.

Same; "wage-fixing authority".—Where plaintiff's occupation was not covered by the Classification Act; and where his compensation was set by the Governor of the Canal Zone, after the Governor had considered the recommendation of a wage board appointed by himself; it is *held* that plaintiff's wages were fixed by a "wage-fixing authority" within the meaning of the statute.

Same; administrative interpretation not ratified by 1937 Act.—Where in 1937 Congress amended Section 81 of Title 2 of the Canal Zone Code (50 Stat. 486), reaffirming both the President's general power to fix the compensation of Canal Zone employees and also the rights of Canal Zone employees under Section 23 of the 1934 Act; there is no indication that in the enactment of the 1937 statute Congress intended to ratify the administrative-executive practice in the Canal Zone of not paying overtime to monthly- or yearly-salaried employees, in accordance with Section 11 of the Executive Order of February 1914, as amended, and the Comptroller General's ruling of August 1934.

Same; overtime pay to be determined on basis of 5-day week of 40 hours.—Where plaintiff was employed by the Government at a monthly salary and was assigned to work 8 hours a day while Section 23 of the Act of March 28, 1934, was in effect, limiting his workweek to 40 hours; it is *held* that plaintiff was, in legal effect, hired for a 5-day week, and that his daily wage, for the purpose of computing overtime pay, must be determined on that basis.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. Harvey C. Long* and *Harry D. Ruddiman* and *King & King* were on the briefs.

Mr. Wilbur R. Lester, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States, and was employed by the Panama Canal, on a monthly basis in various capacities from December 18, 1909, to August 31, 1939, when he retired.

2. Plaintiff brings this action to recover for overtime, for the period March 28, 1934, to August 31, 1939, computing

the time on a 40-hour week basis, under the provisions of Section 23 of the act of March 28, 1934, 48 Stat. 522, which reads as follows:

> SECTION 23. The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

3. The general conditions of employment for employees of the Panama Canal were fixed by Executive Order No. 1888, promulgated by the President on February 2, 1914, as amended by executive Order No. 2514, promulgated by the President January 15, 1917, which executive orders are in evidence as part of stipulation exhibits A and B, respectively, and are made part hereof by reference.

These orders included the following provisions:

> 1. The salaries or compensation of employees shall in no instance exceed by more than twenty-five per centum the salaries or compensation paid for the same or similar services to persons employed by the Government in Continental United States, as determined by the Governor of the Panama Canal.
>
> 8. All appointments shall be made by the Governor of the Panama Canal, or by his authority, except the district judge, district attorney, marshal, clerk of district court and his assistant.
>
> 11. Employees whose salaries are fixed on a monthly or annual basis will receive no pay for overtime work.
>
> 12. Employees above the grade of laborer, appointed with rates of pay per hour or per day, will not be employed over eight hours in any one calendar day, except in case of emergency. The time such employees work over eight hours in one calendar day, and time worked on Sundays and regularly authorized holidays, including January 1st, February 22nd, May 30th, July 4th, Labor Day, Thanksgiving Day, and December 25th, shall be considered overtime for which time and one-

half will be allowed. Such employees who work on the days prior and subsequent to the holidays specifically named above will be allowed their regular pay for eight hours for such days, in addition to pay for any work performed.

20. All employees who are citizens of the United States, and aliens whose compensation is more than $75 per month or 40¢ per hour, shall be entitled to leave privileges.

21. Leave will be divided into three classes, viz: (1) annual leave, (2) cumulative leave, and (3) travel leave.

26. In cases of hourly and per diem employees annual leave on account of sickness or injury shall be based upon a day of eight hours.

29. Thirty days' cumulative leave will be allowed each employee paid on a monthly or annual basis for each year of his service, and twenty days to each employee paid on an hourly basis. This leave will be due after completing ten months' service each year and may be taken when the employee's service can be spared. It may be taken annually or left to accumulate to the credit of the employee, provided, however, that the maximum number of days' leave with pay of all kinds which may be granted at any one time or which may be commuted into a cash payment at termination of service is 120.

42. Office hours and hours of labor will be fixed by the Governor within the limits prescribed by law.

4. During the period from March 28, 1934, to January 6, 1937, plaintiff was employed by the Panama Canal as operator or leverman aboard the dredge *Las Cruces*, at a monthly salary of $306; from January 7, 1937, to November 30, 1937, he was employed as chief operator aboard the same dredge, at a monthly salary of $311; and from December 1, 1937, to August 31, 1939, he was employed as master of the same dredge at a monthly salary of $336. The salary so paid the plaintiff was in accordance with the rates fixed by the Governor of the Panama Canal for the positions held by plaintiff.

5. The dredge *Las Cruces* was a diesel electric hydraulic pipe line dredge, with a twenty-four inch discharge pipe, 224 feet in length, 50 feet beam, drawing 14 feet of water, displacing 2,500 tons, with a main power plant of four 911 H. P. diesel engines, each of which was connected to a 550

K. W., 270-volt main generator, and a 220 K. W., 120-volt auxiliary generator.

6. During the period from March 28, 1934, to August 31, 1939, it regularly operated on a schedule of 24 hours each day, except Sunday, divided into three eight-hour shifts, and was engaged principally in maintaining canal channels and terminal harbors. Occasionally it operated on Sundays, especially when engaged on important work which had to be completed as quickly as possible. Repairs and replacements of the machinery and equipment were usually made on Sundays to avoid loss of dredging time during the week. Such repairs and replacements were scheduled by the master of the dredge, and he made arrangements for the force of men required to perform the work, and was usually present to supervise the work, which was normally completed during the day watch on Sundays.

7. The master of the dredge was in charge of all operations of the dredge, including disposition of spoil, supervision of fills, construction of temporary spillways, and other control works directly connected with the operation of such equipment. He was required to have a license as Master, Pipe Line Suction Dredge, issued by the Board of Local Inspectors of the Panama Canal. He operated the dredge when required to do so, was either aboard or in the vicinity of the work being done eight hours each day, and was available for emergency calls at all hours.

8. During his employment as master of the dredge *Las Cruces*, from December 1, 1937, to August 31, 1939, plaintiff's normal duties required his presence on the dredge or on related work away from the dredge, 8 hours per day, 6 days per week, usually working from 7 a. m. to 3 p. m. He was subject to call for duty at any hour of the day or night in case of a major breakdown of the equipment or any other unusual circumstances.

9. Compensatory time off was granted in accordance with the regulations issued by the Governor of the Panama Canal. As a rule definite schedules for relief were prepared in advance. Overtime required was arranged orally by the master to suit the exigencies of the work. The master usually fixed

his own overtime requirements. However, in some instances he could be specifically instructed by his supervisor to handle some work at such a time that overtime on his part would be required. He might also receive notice of emergencies requiring special duty outside of regular working hours, from his subordinates, or through his supervisor.

Panama Canal Personnel Regulations, Paragraphs 48.2 and 48.3 were as follows:

> 48.2. *Recuperative time for monthly employees working irregular hours.*—In case a monthly employee, regularly employed in the daytime, works at night, he may be allowed time off the following day if needed for rest or recuperation without having the time charged against his leave.
>
> 48.3. *Relief time for Sunday or holiday work.*—A monthly employee who works regularly and is required to work on a Sunday or holiday may be granted relief time for such service by the head of his department or division when it is practicable to do so without detriment to the work or incurring additional expense, but the granting of such time is not a vested right. When such time is allowed to an employee whose rate of pay is computed on a 28-day month, it shall be granted on a basis of 28 days' service each month except that during the month of February he may be granted two days off. This does not apply to employees engaged on certain classes of work for which special rules for allowing relief time have been approved by the Governor.

Masters ordinarily did not take advantage of the relief afforded by Paragraph 48.2, and they reported for work the following day if able to do so. If the plaintiff, as master, wished to leave his work for personal reasons part of a day, there ordinarily would have been no objection.

10. The chief operator stood a regular 8-hour watch as operator (leverman), and was acting master during the absence of the master, which absences averaged about two months a year. He was in charge of and responsible for all equipment aboard the dredge when the master was not aboard. He was required to hold a license as Master, Pipe Line Suction Dredge.

While employed as chief operator, dredge *Las Cruces*,

from January 7, 1937, to November 30, 1937, plaintiff was required to stand a regular 8-hour watch as operator, 6 days each week. Such work as plaintiff performed outside his regular working hours or on Sundays and holidays was compensated for as provided by Paragraphs 48.2 and 48.3, Panama Canal Personnel Regulations, as above quoted. Plaintiff customarily worked on day shifts, but on occasion performed work on night shifts. As chief operator he was a representative of the master during his absences from the dredge, and he also served as acting master during the master's absences on leave.

11. An operator of a dredge stood a regular 8-hour watch as operator (leverman), 6 days a week, and was in charge of and responsible for all equipment at all times when the master and chief operator were not aboard. He was required to hold a license as Master, Pipe Line Suction Dredge. He was in charge of the dredge during his watch, and directed the activities of pipe line foremen and deckhands.

While employed as operator on the dredge *Las Cruces*, from March 28, 1934, to January 6, 1937, plaintiff was required to stand a regular 8-hour watch on the basis of a 48-hour week. Such work as plaintiff performed outside his regular working hours or on Sundays and holidays, was compensated for as provided by Paragraphs 48.2 and 48.3, Panama Canal Personnel Regulations, quoted in finding 9.

12. April 9, 1919, the Governor of the Panama Canal created a Board on Rates of Pay—Gold Roll, by a written communication, reading in part as follows:

THE PANAMA CANAL, EXECUTIVE OFFICE,
Balboa Heights, C. Z., March 31, 1919.

To all concerned: * * *

You are hereby appointed as a board to advise me on wages for The Panama Canal and Panama Railroad employees on the gold roll who are members of the American Federation of Labor.

(1) The Board is an advisory one to recommend rates of pay to the Governor and is without authority to make promises except as to its recommendations.

(2) This Board will recommend wages for positions filled in whole or part by employees who are members of the American Federation of Labor.

(3) Rates will generally be equal to States' rates plus 25 percent for similar positions in the Government service in continental United States. If there are no similar Government positions, Canal rates may be based on nongovernment ones, plus 25 percent; provided, however, such rates properly coordinate with similar or related ones in the Canal service which have been established directly on Government ones.

(4) The Board will not make recommendations for individuals but for positions.

The foregoing, together with other documents from which quotations are made in this report, are in evidence as exhibits to the stipulation of plaintiff and defendant and are made a part hereof by reference.

13. May 21, 1927, the Governor of the Panama Canal issued an announcement covering a change in the name of the Board on Rates of Pay—Gold Roll to the "Wage Board," which provided in part as follows:

BALBOA HEIGHTS, C. Z.,
May 21, 1927.

* * * * *

4. Cases referred to the Board shall include, in general, those relating to hourly rates for all crafts, monthly rates derived from hourly rates, and monthly rates such as those for employees of floating equipment, in the transportation department of the Panama Railroad, or elsewhere, which are derived from rates paid for the same or similar services in the United States. Cases involving the rates for clerical positions will not ordinarily be referred to the Board.

5. Employees who desire wage adjustments should first take up the matter with their official superiors in their department or division. If a satisfactory adjustment is not secured they should forward their claims to the Governor, requesting submission to the Wage Board. Such claims may be forwarded either directly to the Governor or through labor organizations.

6. Claims for changes in rates of pay should be accompanied in each instance by a written statement of the rate desired and the arguments which are considered

to justify it, together with such data as the employee or group of employees may have in support of the claim.

7. In recommending rates the Board will be guided by the provisions of Act of Congress of August 24, 1912, and of Executive Order of February 2, 1914, which provide that, "the salaries or compensation of employees shall in no instance exceed by more than twenty-five per centum the salaries or compensation paid for the same or similar services to persons employed by the Government in continental United States," and by the general Panama Canal policy of paying twenty-five per centum over pay for comparable work in Government service in the continental United States. When no similar Government positions exist, Canal rates may be recommended on the basis of not to exceed twenty-five per centum above salaries or compensation in non-governmental positions, provided that such rates coordinate with those of other employees of The Panama Canal and Panama Railroad.

14. Personnel Regulations of the Panama Canal Zone, dated March 1, 1928, contained, among others, the following paragraphs:

33. WAGE BOARD

33.1 *Membership.*—The Wage Board, formerly known as the "Board on Rates of Pay—Gold Roll," will be composed of 2 members; 1 appointed by the Governor and 1 nominated by the Panama Metal Trades Council and approved by the Governor. The latter member must be a bona fide employee of The Panama Canal or the Panama Railroad.

33.3 *Cases handled.*—Cases referred to the Board shall include, in general, those relating to hourly rates for all crafts, monthly rates derived from hourly rates, and monthly rates such as those for employees of floating equipment, in the transportation department of the Panama Railroad, or elsewhere, which are derived from rates paid for the same or similar services in the United States. Cases involving the rates for clerical positions will not ordinarily be referred to the Board.

15. Based on the opinion and recommendations of Major R. A. Wheeler, a member of the Wage Board, the Governor of the Panama Canal issued a memorandum and schedule of rates and pay for positions on certain floating equipment as follows:

BALBOA HEIGHTS, C. Z.,
October 31, 1930.

Memorandum for *Marine Superintendent*
Superintendent of Dredging

Rates of Pay-Positions on Floating Craft

1. The following memorandum from the Governor is quoted for your information and guidance:

BALBOA HEIGHTS, C. Z.,
October 29, 1930.

1. The increases in pay allowed for any position on pipe line suction dredges when operating with a relay or when the master is absent are hereby discontinued, effective December 1, 1930.

2. Major Wheeler's schedule will be used hereafter as a guide in adjustments of pay on the floating craft of the Marine and Dredging Divisions, unless in the meantime positions can be based on craft operated by the United States Government.

3. No rates of pay will be reduced (except as indicated in paragraph 1 above) but when basic rates are adjusted upward other positions will not move upward accordingly, unless Major Wheeler's schedule shows an increase is due. When the basic rates are lowered by any stated amount all positions will move downward the same amount.

4. Thus there will be a gradual approach toward the differentials recommended by Major Wheeler, but no changes in rates (except as indicated in paragraph 1) will be made either for men now in service or for new men taken on or promoted. Furthermore, the differentials recommended by Major Wheeler are to be considered as tentatively adopted, and if any specific inconsistencies are found in his schedule the matter may be taken up by a separate letter concerning any one or more positions.

H. BURGESS, *Governor.*

2. In conformity with the foregoing, until approval otherwise is authorized, rates of pay (except as specifically stated to the contrary) of all positions on the following floating equipment, and rates of pay for certain shore positions coordinated with floating equipment positions, shall be based on one controlling rate in the Dredging Division—and that is the rate for master of pipe line suction dredge, which rate in turn shall be

based upon rates paid on plant operated by the Engineer Corps, U. S. Army, in the United States, derived in accordance with the method of computation heretofore approved.

(a) Pipe line suction dredges—all positions.

* * * * *

3. The schedule of differentials proposed by Major Wheeler and approved tentatively by the Governor is not reproduced in full in this memorandum due in part to the burden of typing and in part to the fact that the pay of none of the employees concerned is affected at this time (except as indicated in paragraph 1 of Governor Burgess' memorandum), nor will be affected until such time as adjustments are made in the rate for master pipe line suction dredge, in conformity with changes in basic rates in the United States. The following tabulation, however, shows the proposed coordination in rates of pay for the greater portion of the various floating equipment positions and the relation between the master's rate on each piece of equipment to the rate for master, pipe line suction dredge:

Rate of pay for—

Equipment	Master	Chief engr.	Engr.	Chief opr.	Opr.	Mate	Foreman	Master's differential with respect to rate for master P. L. S. D.	Change
Las Cruces........	$336	$311	$266	$311	[1]$276	$231	$211	+$20	0

[1] This amount is apparently an error, as "Memorandum for Personnel Bureau" dated December 2, 1929 (Plaintiff's Exhibit No. 4), shows the rate of pay for operators to be $306 per month. See also Finding 4.

4. Dredging and Marine Division employees affected who are desirous of ascertaining changes in differentials which have been tentatively approved may obtain this information from any of the following sources:

Marine Superintendent.
Superintendent, Dredging Division.
Bureau of Statistics, Executive Dept.
Labor Member, Wage Board.

16. Section 23 of the act of March 28, 1934, has been quoted in finding 2. April 4, 1934, the Chief of the Wash-

ington Office of the Panama Canal wrote to the Comptroller General of the United States as follows:

> The Governor of The Panama Canal has requested by radio decision as to the application of Section 23 of the Independent Offices Appropriation Act for the fiscal year ending June 30, 1935 (Public, No. 141), which was passed on March 28, 1934. That section reads as follows: [Here follows Section 23, quoted in finding 2.]
>
> The Governor's radiogram of April 3, 1934, in which explanation is made of the situation and the questions to which answers are desired are propounded, read as follows:
>
> Interpretation is desired regarding application of Act to Canal employees. Twenty-five hundred American employees in Canal service [are] now working following hours per week:
>
> | | |
> |---|---|
> | Administrative and clerical workers | 42 |
> | Shop and building trade craftsmen | 48 |
> | Operators locks, power plants, pumping plants | 48 or more |
> | Pilots and employees on floating equipment | 48 or more |
> | Physicians, nurses, policemen, and firemen | 50 or more |
>
> For employees not under classification, compensation of these employees is fixed by the Governor with assistance of wage boards. Ascertain if Section 23 of Independent Offices Act requires payment of overtime after 40 hours' service per week for
>
> (1) Employees in artisan and mechanical groups compensated at hourly rate of pay;
>
> (2) Similar employees compensated at monthly and annual rates of pay;
>
> (3) Employees on floating equipment, policemen, firemen, etc.;
>
> (4) Physicians, nurses, clerical, and allied workers under classification * * *

The Comptroller General rendered his decision on the foregoing matters on April 12, 1934, and subsequently, in response to a request from the Governor of the Panama Canal for reconsideration and for answers to several other specific questions, he rendered a second decision on August 25, 1934. He held that Section 23 was applicable to employees of the Canal Zone, including monthly employees, and that it required that the regular hours of work of such employees be limited to 40. He also held that no additional compensation for

overtime was authorized as to employees who were on a monthly pay basis. The decisions of the Comptroller General of April 12, 1934, A-54726, and August 25, 1934, are printed in 14 Comp. Gen. 156-165.

17. The records of the Panama Canal do not disclose that plaintiff or any other pipeline suction dredge operator made any formal demand to be placed on a 40-hour-week schedule or to be paid overtime for time worked in excess of 40 hours per week after March 28, 1934. Immediately before his retirement, however, plaintiff sent the following letter to the Executive Secretary under date of August 29, 1939:

> As it is my belief that all Dredgemen should have been given the 40-hour week I propose to submit a claim to the Court of Claims.
>
> I request a statement to be used in presenting my claim, showing time worked by me in excess of 40 hours per week since the effective date of the Thomas Amendment.
>
> Would also like to have certified copies of wage board meetings and Governor's approval of wage board recommendations whereby my wages were established.
>
> I would be glad to confer with you and agree as to the presentation of my claim.

Since plaintiff was employed and compensated on a monthly basis, the official records of the Canal do not show the hours actually worked by him, and plaintiff's request in said letter for a record of the number of hours worked could not be granted.

18. The timekeeper for the master of the dredge *Las Cruces* kept a book or log purporting to show the days each employee reported for work. Plaintiff made a copy from that book of the days worked by him, and made a calculation reduced from a monthly basis to a daily and hourly basis and from the figures thus obtained, computed his overtime as follows:

> 105½ days of 8 hours each in excess of 40 hours a week from March 28, 1934, to January 6, 1937, as operator.
>
> 45 days of 8 hours each in excess of 40 hours a week from January 7, 1937, to November 30, 1937, as a chief operator.
>
> 84 days of 8 hours each in excess of 40 hours a week from December 1, 1937, to August 31, 1939, as master.

19. Plaintiff's salary as operator was $306 a month, which he reduced to $14.12 per day by computing it on a 40-hour week basis. His salary as chief operator was $311 a month reduced to $14.35 a day by computing it on a 40-hour per week basis. His salary as master was $336 a month, reduced to $15.51 per day by computing it on a 40-hour a week basis.

20. Upon the basis stated in findings 18 and 19 plaintiff's overtime compensated for at time and one-half would be as follows:

105½ days as operator	$2, 234. 49
45 days as chief operator	968. 40
84 days as master	1, 954. 68
Total	5, 157. 57

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff was an employee of the Panama Canal. During the period here in question, March 28, 1934, to August 31, 1939, he was, successively, operator or leverman, chief operator, and master, of the dredge *Las Cruces*, which was operated by the Government in the Canal. He was employed and paid on a monthly basis. He worked eight hours per day, six days per week. He claims that under Section 23 of the act of March 28, 1934, 48 Stat. 522, forty hours per week was set as the regular work period for his job, and payment of time and a half for overtime was directed, hence he should have been paid at the rate of time and a half for his sixth day of work in each week throughout the period.

Section 23 is as follows:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

On April 4, 1934, which was within a few days after Section 23 was enacted, the Governor of the Panama Canal sought the decision of the Comptroller General as to whether Section 23 was applicable to employees of the Panama Canal, and if so whether it required the payment of overtime to certain described classes of employees. See finding 16. The Comptroller General answered on April 12 that Section 23 was applicable to certain of the employees described, since their wages were set by wage boards or other wage-fixing authorities within the meaning of the section and that it was applicable to employees paid by the month as well as those paid by the hour. He made no direct answer to the question of overtime for monthly employees, but a negative answer can fairly be inferred from the following statement:[1]

> You are advised, therefore, that employees of the classes numbered (1) and (2)[2] in the submission are subject to the provisions of section 23 of the act of March 28, 1934. As to class (2), however, no change in the monthly or annual rate of compensation other than that required to pay a rate not lower than the rate per annum or per month paid June 1, 1932, less any applicable percentage reductions, would be authorized. That is to say, they are to receive the same monthly or annual compensation although their regular hours of duty may be reduced.

The Governor thereafter attempted to save some money in spite of Section 23, by putting certain monthly paid employees on an hourly basis. He then divided the June 1, 1932 monthly salary by 224, the number of hours which, he estimated, they had been working per month, including 8 hours a day for six days a week, 16 hours for occasional overtime, and something more for occasional work on Sundays and holidays. According to this statement, they had been working 52 hours per week. Having thus computed their

[1] The decision of April 12 is quoted in the body of a later decision, 14 Comp. Gen. at 158.

[2] In the question submitted by the Governor, hourly paid artisan and mechanical employees were classified as (1) and monthly paid employees of the same trades were classified as (2).

In other decisions of the Comptroller General, given in response to inquiries from the Public Printer and the Secretary of the Navy, the Comptroller General was more explicit on the question of overtime for monthly employees, 13 Comp. Gen. 265, 270; Id. 277, 280. These decisions are referred to hereinafter.

hourly wages, he then added 20 percent to this hourly wage, so as to pay them the same for the new 40-hour week as they would have received before for a 48-hour week, though they had in fact been working, and had been paid for, many more than 48 hours, according to his computation of their previous hourly earnings. The computation is shown at page 163 of 14 Comp. Gen. The net result was to substantially reduce their monthly earnings. The employees complained, and the question was submitted by the Governor to the Comptroller General along with some related questions, and a request for reconsideration of his former decision. The Governor's view as to the applicability of the 40-hour week to monthly employees is shown by his statement which was included in the submission to the Comptroller General:

> (a) The former monthly rates of pay for electricians and other craftsmen in operating positions included compensation for a definite amount of overtime service each month, which no longer can be worked under the new law. [14 Comp. Gen. at 163.]

The Comptroller General in reply reaffirmed his decision of April 12, and disapproved the recomputation of monthly wages described above. 14 Comp. Gen. 156, 164. In demonstrating the impropriety of subtracting that part of the former monthly salary which, the Governor said, had been included to compensate for overtime, the Comptroller General said, at 164:

> * * * it is fundamental that a rate of compensation fixed by the month or year for full-time service is inclusive of any amount of overtime; that is, the compensation is for every day and every hour of the month or year whether or not service is actually rendered. * * *

At page 165, the Comptroller General said:

> Referring to question no. 2, the procedure adopted changing the monthly rates to per hour rates, with a resulting deduction in weekly earnings, was not proper. As stated in decision of April 12, the proper procedure was to continue the payment of the same monthly rates of compensation even though there may have been a reduction in the number of hours per week and no overtime compensation is authorized. This is the gen-

eral rule that has been adopted under the 40-hour week statutory provision for all employees paid on a monthly or annual basis to which the provision is applicable.

It appears from the above and from the rest of the statement of the Comptroller General that he decided that Section 23 applied to monthly employees who were artisans or mechanics, and that therefore their monthly salaries could not be reduced below the June 1, 1932, level, no matter how much their hours were reduced. He was not presented with the question as to whether they could be regularly worked more than 40 hours a week, since the Governor had taken the position that they could not, but he had advised the Governor in his April decision that Section 23 was applicable to them, and his discussion of the Governor's attempted recomputation assumes that their workweek was to be 40 hours, as Section 23 specifies. In one or perhaps two places in his discussion he observes that monthly employees should not be paid overtime.

It seems that with regard to the plaintiff, and, presumably, other employees similarly situated, the observation in the Comptroller General's statement that monthly paid employees were not entitled to overtime was the part of the statement which the Governor made the most use of. He worked the plaintiff 48 hours a week and paid him no overtime. He could not have done this because he thought Section 23 was not applicable to the plaintiff. The Comptroller General had squarely held that it was applicable. He could not have done it because he thought the 40-hour-week limitation was not applicable to the plaintiff, though other parts of the section were. He had, in his submission of the question, stated that if the Comptroller General adhered to his decision of April 12, monthly employees could not be worked more than 40 hours a week. The Comptroller General's language assumes that the 40-hour-week provision was applicable and that monthly employees would be worked only 40 hours a week. Thus in disregard of the advice which the Governor had asked and received, Section 23 was effectively flouted, and the Governor's attempted economy, which, when presented under another guise, had been rejected by the Comptroller General, was accomplished by the expedient of disobeying

the 40-hour-week limitation of Section 23. The record does not show that the question of the legality of this expedient was ever presented to the Comptroller General.

We think that the Governor's solution of the problem was a legally impossible one. Either Section 23 was applicable or it wasn't. The Comptroller General held that it was. If it was, the plaintiff's workweek should have been 40 hours, as the section said it should be, and as the Comptroller General assumed that it would be. If it still remained "fundamental," in the face of the new statute, that a monthly employee's monthly pay is "for every day and every hour of the month or year whether or not service is actually rendered," as the Comptroller General had said in another connection, so that the plaintiff could not be paid for overtime, then he should not have been worked overtime, at least as a regular practice. The attempted combination of this "fundamental" doctrine with Section 23 made an impossible mixture which could not have been intended by Congress. No ordinary rule of law or precept of a department remains fundamental after Congress has, by a statute, negatived it.

In what we have said so far, we have assumed, as the Comptroller General did, that Section 23 applied to employees of the Panama Canal, and to monthly employees. The Government denies both assumptions.

As to the first, the Government points out that Section 23 is applicable only to the situation of "the several trades and occupations" whose wages are "set by wage boards or other wage-fixing authorities." Our findings 12 to 15 show that the wages of artisans and mechanics such as the plaintiff were set by the Governor of the Canal after recommendations made by a wage board appointed for that purpose by the Governor. We think, as did the Comptroller General, that this prerequisite of the applicability of Section 23 was met. The Governor has so administered the law as to employees paid by the hour, since shortly after its enactment in 1934.

As to the second point, the Government urges vigorously that Section 23 was not intended by Congress to have, and consequently does not have, any application whatever to employees paid by the month, either in the Panama Canal or

elsewhere. In its brief and argument it presents items of legislative history and statements of departmental practice, which, it claims, support this view.

The most directly pertinent piece of legislative history is a statement made to the subcommittee of the Committee on Appropriations of the Senate [3] by Mr. Alifas, a representative of unions in the American Federation of Labor, "on behalf of the 75,000 or more per diem mechanics and workmen employed at the Navy yards, arsenals, the Panama Canal Zone, and other divisions of the Federal Service * * *." The bill before the committee was the Independent Offices Appropriation bill which proposed to restore the general 15 percent wage cut for federal employees which had been put into effect the previous year. Mr. Alifas urged that his constituents would not be made whole by a mere restoration of the percentage cut; that the departments employing them had further cut their pay by a system of regular lay-offs without pay which had reduced their workweek to 40 hours and their pay correspondingly. He presented a suggested draft of an amendment to accomplish his purpose, as follows:

> *Provided*, That the rates of compensation for the several trades and occupations, which are set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than the respective wage schedules in effect on June 1, 1932; and that the Navy Department and other departments and independent establishments of the Government are hereby directed to restore to employees any reduction in pay which they have received since June 30, 1932, in addition to the 15 percent congressional cut, without increasing the present hours of service; and that the respective departments and independent offices are hereby authorized to incur such deficiencies as may be necessary to put this provision into effect.

The committee did not adopt the suggested amendment.[4] But when the bill came to the floor of the Senate, Senator Thomas of Oklahoma, who was a member of the subcommittee, offered the amendment which became Section 23.[5] Such discussion as occurred on the floor of the Senate and

[3] Seventy-third Congress, Second Session, Hearings on H. R. 6663, pp. 59–61.
[4] Senate Rep. No. 294, 73d Cong., 2d Sess.
[5] Cong. Rec., Vol. 78, Part 3, p. 2977, 73d Cong., 2d Sess.

the House throws little light on our problem as to whether the benefits of the section were to extend to monthly paid employees. No one suggested that it was not to do so. Senator Cutting, in debate on the bill, said that the bill was designed to do "in effect what the N. R. A. is trying to do, to pay the same amount of wages for shorter periods of labor." [6] If any one had said, at that point in the debate, that a mechanic paid by the month was not to have his hours of labor reduced, it would have been hard to suggest a reason for such a discrimination. If the policy was to reduce hours without reducing pay, that policy would have been just as applicable to monthly paid employees as to those paid by the hour. Not a syllable in the text of Section 23, or a word in the debates in Congress, even suggests the distinction which the Government asks us to draw.

The presentation to us of the statement of Mr. Alifas before the subcommittee persuades us that it is quite likely that the idea of Section 23 was originated by the union leaders of the per diem employees for whom he spoke, and that it may well have been their agitation which caused the section to be inserted in the law. But the benefits of a statute, general in terms, and whose policy is applicable to others, cannot be made the exclusive property of the persons or organizations who agitate for and bring about its passage.

The need of monthly paid employees for the protection of Section 23 soon became apparent. As we have seen, as soon as the Governor of the Canal was advised by the Comptroller General that the 40-hour-week provision of Section 23 was applicable to monthly employees, he cut their hours, and cut their wages below the 1932 level. It was their complaint concerning this wage cut which caused the second submission of the question to the Comptroller General. He held that Section 23 not only required that employees who had had their weekly wages reduced by reducing their hours, should have their weekly wages restored to the 1932 level, but that employees who had not had their weekly wages cut, since they were paid by the month and were worked 52 hours a week, should not have them cut, after the enactment of Section 23, by the reduction of their work week to 40 hours.

[6] Cong. Rec., Vol. 78, Part 5, p. 5574, 73d Cong., 2d Sess.

According to the Government's contention, the Governor was right. Section 23 was inapplicable, and he could have maintained the 52-hour work week at the same pay, or could have cut it with a corresponding reduction in pay. The result, then, of an act of Congress, which on its face was just as applicable to monthly employees as to any other employees, and which said that the weekly wages of employees "shall be reestablished and maintained at rates not lower than" the 1932 rates would have been that monthly employees would have had their wages cut below the 1932 level for the first time, while other employees were having theirs restored to the 1932 level. That Congress could have *sub silentio* entertained any such contradictory intention seems incredible. The Comptroller General ruled that the cut in pay was "in contravention of the plain terms of the statute." Thereupon the Governor abandoned that scheme for balancing his budget, but accomplished the same purpose by taking advantage of the Comptroller General's observation that if he worked monthly employees more than the statutory maximum hours, he still would not have to pay them for the extra work.

It is urged that there had been, before the enactment of Section 23, no reduction in the wages of monthly employees other than the general percentage reduction and that therefore the section, except for the proviso, could not have been intended to have any application to such employees. We do not think that it may be assumed that in all the departments having monthly paid mechanical employees there had been no furloughs without pay or other arrangements to spread the work and at the same time keep the pay roll within the available funds. The Governor of the Panama Canal had, it seems, met the problem by increasing the hours of those monthly employees who were retained on the pay roll. Other administrators may have solved it by spreading the work in some such way as that suggested above. As we have seen, the Governor proposed, after Section 23 was enacted, to put his monthly employees on an hourly basis for a shorter week and thus reduce their pay. If the Government's position that Section 23 was inapplicable to them is correct, he could lawfully have done so. The Comptroller General ruled that he could not, and for that reason only he did not. We think,

therefore, that there may well have been occasion for the direct application of the first part of Section 23, as well as the proviso, to monthly employees.

The Government points out that in July 1937, after three years of administration of Section 23 as not requiring overtime pay to be paid to monthly employees, Congress amended Section 81 of Title 2 of the Canal Zone Code (50 Stat. 486, 487), so that, while it still lodged in the President the power to fix the compensation of employees until Congress should do so, it contained the following new language:

> *And provided further* that nothing contained in this section shall affect the application to employees of the Panama Canal of the provisions of section 23 * * * [of the Act of 1934].

The Government contends that Congress in 1937 presumably was aware of the whole previous history of legislation and executive orders, "the consistent administrative practice of 23 years, including 3 after the passage of Section 23, the Comptroller General's decision on Section 23, and Section 23 itself."

The administrative practice for the first 20 of the 23 years, i. e., down to the enactment of Section 23 in 1934, would have been of no significance even if Congress had been aware of it. Until 1934 the President had, under the 1912 act, the power to fix compensation and hours of work. He had ordered that monthly employees should not receive overtime, and that settled that question until Congress acted. Administrative interpretation was of course in accord with the President's plain order, and proves nothing about what Congress meant by what it did later. In 1934 Congress, in enacting Section 23, provided for overtime for employees in terms that, on their face, did not exclude monthly employees. In 1937 Congress reaffirmed both the President's general power to fix compensation and conditions of employment, and the rights of employees under Section 23. If, as we think, its intention in 1934 in enacting Section 23 had been to give overtime to monthly employees such as plaintiff, and it had known in 1937, as the Government would have us presume, that that intention had been frustrated by administrative interpretation, it might plausibly be argued that

its proviso reaffirming Section 23 was intended to negative, rather than to ratify, that administrative interpretation.

The proposed amendment of Section 81 of the Canal Zone Code was first introduced in the Seventy-fourth Congress[7] for the purpose of confirming the President's authority to provide for the commutation of leave.[8] The proviso quoted above preserving the effect of Section 23 was attached when the amendment was reintroduced in the Seventy-fifth Congress.[9] The Government quotes letters to the Congressional Committees from the Governor of the Canal and the Secretary of War saying that Section 23 was "general legislation of the United States which is not applicable to American employees of the Canal generally and affects only a certain number of employees in particular groups by reason of a ruling to that effect by the Comptroller General." These statements as to the limited effect of Section 23 were obviously true, without regard to the problem here in question. None of the employees in the classified service were intended to be covered by it. The ruling of the Comptroller General was not cited, nor its purport stated. The letters therefore contained nothing which would have suggested to Congress that the Governor, having been advised by the Comptroller General that Section 23 was partly applicable and partly nonapplicable to monthly paid employees such as the plaintiff, was, in his administration, ignoring the section completely. If Congressmen had searched out and read the decisions of the Comptroller General they still would have found no intimation that the Governor had, in disregard of those decisions, been continuing to work monthly employees a regular workweek of 48 hours in the face of a statute limiting the workweek to 40 hours. The Government points out that the amendment to Section 81 saving the effect of Section 23 was drafted by the Governor of the Canal. He knew how he had been administering Section 23, but how any Congressman could have guessed it, we cannot see. In these circumstances, the 1937 act seems to us to throw no light upon our problem,

[7] H. R. 6719, 74th Cong., 1st Sess.

[8] S. Rept. No. 1821, 74th Cong., 2d Sess., p. 2, which incorporates H. Rept. No. 744, 74th Cong., 1st Sess., on the purposes and effects of the proposed amendments of the Canal Zone Code.

[9] H. R. 6144, 75th Cong., 1st Sess.

and we treat its proviso as being merely a reaffirmation of Section 23 of the 1934 act, with that section's original meaning.

The Government urges that, in addition to the administrative practice of the Governor of the Canal, which was, as we have seen, to disregard the provisions of the law relating to the 40-hour week and overtime pay, the War and Navy Departments similarly administered the statute, and that this consistent administration gives it the meaning urged by the Government. The evidence of this departmental administration consists of letters from the War and Navy Departments to counsel for the Panama Canal, dated in November 1943. The War Department letter says that per annum and monthly employees have not been paid overtime under Section 23. The Navy Department letter says that per annum employees have not been so paid. Neither letter says that such employees have in fact been worked overtime, either regularly, as the plaintiff was, or at all.

Some further light on what the probable administrative practice of the Navy Department has been, is had from reading the questions submitted by the Secretary of the Navy to the Comptroller General on April 6, 1934, a few days after the enactment of Section 23, and that official's answer.[10] The Secretary's sixth question was whether per-annum or per-month employees who worked in excess of 40 hours a week "because of an extraordinary emergency" would be entitled to overtime pay under Section 23. The Comptroller General said they would not, and referred the Secretary to his decision of a few days earlier relating to employees of the Government Printing Office. In that decision [11] he had said, at page 269:

> * * * the regular hours of work of per annum employees within the terms of Section 23 of the act of March 28, 1934, are required to be fixed at not to exceed 40 per week * * *

In answer to question six of the Public Printer, as to whether per annum employees were entitled to overtime compensation, the Comptroller General said, 13 Comp. Gen., at page 270:

[10] 13 Comp. Gen. 277.
[11] 13 Comp. Gen. 265.

Question 6 is answered in the negative. The term "overtime" has never been applicable to employees paid on an annual basis and there is no purpose or intent shown by section 23 of the act of March 28, 1934, to extend the right to overtime compensation to employees paid on an annual basis who may be required to work more than their regular tour of duty of 40 hours per week.

It appears then that the Secretary of the Navy never even raised the question as to whether he could work per-annum and per-month employees more than 40 hours a week without extra compensation except in the case of "an extraordinary emergency." In answer he was told that the regular hours of work of such employees were, by Section 23, "required to be fixed at not to exceed 40 per week," but that overtime need not be paid for overtime work "because of an extraordinary emergency." Whether or how often extraordinary emergencies arose before the overtime statutes were, in the war emergency period, more explicitly made applicable to monthly employees, we do not know. We have no reason to suppose that the Secretary of the Navy or the Secretary of War, like the Governor of the Panama Canal, disregarded the 40-hour-week limitation and habitually worked monthly employees overtime without compensation.

So far as the administration of Section 23 has been disclosed to us, it would seem to have been that monthly paid mechanical employees in the Navy and War Departments, the Government Printing Office, and in any other agency of the Government which had such employees, except the Panama Canal, had their hours of work reduced to 40 without any cut in their pay. The Comptroller General had ruled that that was their right, and we have no evidence whatever that that ruling was not followed. The Government contends that the administrative practice was that Section 23 was not applicable to monthly employees. We think that all the evidence there is, and the fair inferences that may be drawn from it, show exactly the opposite. There is not even any evidence that the Governor of the Panama Canal ever again entertained the thought, after the Comptroller General's rulings in 1934, that Section 23 was not applicable to

monthly employees. All that appears is that he regarded as providential, and took full advantage of, the Comptroller General's subordinate ruling that, even though he did not obey the law, he would not have to pay overtime.

In view of what we have supposed to have been the practices of the other departments, the plaintiff and other Canal employees similarly situated were the victims of gross discrimination. Monthly employees in other departments kept their former pay, plus the restoration of the fifteen percent cut, though they worked only 40 hours. The plaintiff had to work 48 hours to keep his former pay, plus the restoration. There is nothing in the doctrine that administration may give meaning to a statute which permits one administrator, of several who have applied the law, to give it a meaning essentially different from that given by all the others, and thus in effect make a special and peculiar law applicable only to those persons who have the misfortune to come within the area of his administration. Section 23 gave the same rights to employees of the Canal as it gave to employees in the other departments.

To justify the Governor one would have to rely on the ruling of the Comptroller General to the effect that though Section 23 was applicable and limited the work week to 40 hours, yet a longer work week required no additional compensation. In fairness to the Comptroller General, it should be repeated that, so far as appears, the Governor's interpretation of his ruling as permitting habitual violation of the law with impunity, was never presented to him for comment. That ruling, at least as thus interpreted, is without justification in the text of the statute, without logic, and productive of the sort of administrative confusion and discrimination which here confronts us.

What the intended beneficiaries of the statute, the employees, would get under such a doctrine, would, as it has done in this case, range all the way from nothing, in the Panama Canal employment, to much, in the Navy and other departments, where they seem to have had a 40-hour week unless it was extended because of an extraordinary emergency.

The Government cites numerous instances of legislation since the beginning of the war emergency relating to com-

pensation for overtime in Government employment, concerning which, it says, the reports and debates show that those Congressmen who had charge of the legislation thought that monthly and annual employees had not previously been entitled to overtime compensation. We suppose that that was the impression of informed persons. It should have been, since in fact such employees were not getting overtime compensation, because the Comptroller General's rulings had denied it to them. For Congress to have excluded such employees from the new legislation, and to have relegated them to lawsuits to reverse the Comptroller General's rulings concerning the old legislation, would have meant that these employees would probably have left the Government's employment, outside employment at high wages being easy to obtain. It is dangerous doctrine to attribute to legislation which explicitly resolves, for the future, a doubtful question, an intention on the part of the legislature to adopt, and make retroactive, a previous administrative interpretation of the doubtful language. A legislature should feel free to make clear law for the future without danger that it may, thereby, destroy rights which have properly accrued or create rights which have not properly accrued under the unclear, or misinterpreted, language of the former statute. We are not persuaded, therefore, that Congress, by the recent actions to which we are referred, intended to ratify and make retroactive the Comptroller General's interpretation of Section 23 as to overtime for monthly employees.

The Government urges that, even if the plaintiff is entitled to recover overtime, his proposed computation of the amount due him is excessive. The plaintiff's method of computation was as follows: he multiplied his monthly salary by 12 and divided that product by 52 to determine his weekly salary. He divided that weekly salary by 5 to ascertain his daily pay for an 8-hour day, which was what he worked in a 40-hour week, which was what Section 23 called for. Taking this daily wage, he added one-half to it, since Section 23 called for time and a half for overtime, and multiplied that sum by the number of times he had worked a sixth day in a week. By that computation, the plaintiff claims, he will be

correctly paid time and one-half for his overtime, or sixth day, work.

The Government contends, on the other hand, that the plaintiff's monthly pay was for every day in the month, since all of his time was hired; that his daily pay should be found to be one-thirtieth of his monthly pay, and that therefore he has in fact been paid straight time, not only for the 5 days or 40 hours that he should have worked under Section 23, but also for the sixth day that he was required to work and for which he claims overtime. On that basis, the Government urges that the plaintiff is entitled only to the additional half pay for the sixth day of each week. But if we adopt this method of computation, it seems that the plaintiff has already been overpaid, for he has also been paid straight time for the seventh day of each week, when he only worked 6 days, and therefore has received more time and one-half for the sixth day.

The Government suggests, in the alternative, that the plaintiff's monthly pay should be divided by 26, the number of days on which he was actually required to work; that again he has been paid for all the days, 26, that he did work, and is therefore entitled only to an additional half pay for the days which he worked as sixth days in a week, he already having received his regular pay for those sixth days.

We think the Government's contentions are not valid. When the plaintiff was employed at a monthly salary and was assigned to work 8 hours a day while Section 23 which limited his workweek to 40 hours was in force, we think that he was, in legal effect, hired for a 5-day week, and that his daily wage, since it has become necessary to determine it, must be determined on that basis. It follows that he has not been paid at all for the sixth day of each week, and that he may recover straight time, and one-half time in addition, for the sixth day. We think the plaintiff's method of computation accomplishes that result.

We are aware that the act of October 21, 1940,[12] provided:

> * * * in determining the overtime compensation of the foregoing per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of their respective per annum salaries.

[12] 54 Stat. 1205, terminated June 30, 1942.

The House Committee on Naval Affairs said, in its report [13] on the bill which became the act of June 28, 1940, the first of the emergency overtime Acts:

> Overtime pay has heretofore not been allowed to any per annum employees of the Government, although overtime pay at time and one-half is allowed to per diem employees. * * *
>
> In order to calculate the amount of overtime pay for per annum employees it is necessary to specify in the act the corresponding daily pay. This has been done in accordance with long-standing Government custom by fixing it at one three-hundred-and-sixtieth of the annual salary on the customary basis of 12 months to a year and 30 days to a month.

The statements in the two paragraphs of this report seem inconsistent, in that if no overtime had previously been paid to per annum employees, it is not clear how there could have been a "long standing Government custom" as to the method of computing it. The custom must have related to computation of daily pay for some other purpose, of which we are not advised. We think therefore, that the specific statutory method of computing overtime, enacted for the first time in 1940, should not control the computation in this case.

The Government urges that, if Section 23 is made applicable to the plaintiff's employment, it brings that section into conflict with Section 4 of the Panama Canal Act of August 24, 1912, 37 Stat. 560, 569.[14] That section provides that wages of Canal employees shall not exceed by more than 25 percent the wages paid for the same or similar services to persons employed by the Government in the continental United States. The Government says that the only Government employment in the United States to which the plaintiff's employment was comparable was that in the Engineer Corps, U. S. Army, and that Section 23 was not applicable to that employment.[15] We do not know what the pay of Engineer Corps' employees was during the period here involved, nor how many hours they worked per week. In any event, we do nŏt suppose that Congress intended, in enacting Section

[13] H. Rept. No. 2257, 76th Cong., 3d Sess. pp. 3–4.

[14] The act of June 19, 1934, 48 Stat. 1122, enacted the Canal Zone Code, containing the same provision.

[15] 13 Comp. Gen. 486; 14 Comp. Gen. 156, 162.

23, to wholly deny its benefits to particular employees, or particular groups of employees, because the effect of its application would be to increase their wages, by some amount beyond the 25 percent differential. The two sections should have been reconciled, if necessary, by a reduction of the plaintiff's wages, and not by an administrative nullification of Section 23. It is not necessary for us to decide, and we do not decide, which of the sections would govern if a real conflict between them were presented.

The plaintiff is entitled to recover $5,157.57. It is so ordered.

Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

The Economy Act of March 20, 1933, reduced the wages of all Government employees 15 percent. By the Act of March 28, 1934, 5 percent of the pay cut was restored for the remainder of the current fiscal year, and another 5 percent for the following fiscal year. It was called to the attention of Congress, however, that the wages of the per diem employees had been reduced more than 15 percent by the device of laying them off one day every two weeks. To take care of this Congress enacted section 23, providing:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, * * * shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932 * * *.

Evidently this section had no application to an employee paid on a monthly or annual basis because there had been no reduction in the wages of such employee except the general 15 percent reduction, and, therefore, so far as such employee was concerned, the provision accomplished nothing. But it did operate to restore the former wages of the per diem employee "minus any general percentage reduction which may be prescribed by Act of Congress." The "weekly compensation" of these employees had been reduced by the one-day

lay-off every two weeks. This section restored that cut. It had no other effect.

This was the main purpose of the section; the proviso was inserted to prevent the section's being availed of to increase the hours of labor of these per diem employees.

I do not think any part of the section was intended to have any effect on employees paid on a monthly or annual basis.

The section was adopted as the result of the agitation of Mr. Alifas, who was pleading the cause of per diem workers. The language used by Congress must be construed, it seems to me, in the light of the situation it was trying to remedy. It ought not to be held to include other employees since the provision of the Act to restore wages had no effect whatever on the salaries of employees on a monthly or annual basis.

It seems to me, too, that Congress must have known that employees of the Canal Zone paid on a monthly or annual basis were not given any additional compensation for overtime work. The President's Executive Order plainly stated this. It is also true that the Army and Navy Departments did not pay extra compensation for overtime work of such employees, and this had been the rule in those departments for many years. The fact that the Secretary said that in cases of extraordinary emergency they were not paid extra compensation when required to work overtime does not seem to make any difference. Whether overtime work was only in an extraordinary emergency or was habitual does not seem to me to affect the employee's right to extra compensation, if he in fact worked overtime, for whatever cause. Clearly, such employees in the Panama Canal Zone and such employees in the Army and Navy did not receive extra compensation when they did work overtime, and since this has been the practice over many years Congress presumably knew it. If so, and if Congress desired that they should have extra compensation for overtime labor, it seems to me that it would have used language to explicitly include them.

I do not think section 23 has any application to plaintiff and, therefore, he is not entitled to recover.

It is true that the construction of section 23 by the Comptroller General and its administration by the Governor of

the Panama Canal Zone did produce confusion, as the majority opinion says, but no confusion results if it is held that section 23 has no application to such employees at all, and this I think is the correct view to take.

JONES, *Judge*, took no part in the decision of this case.

MRS. ROSE BERCH v. THE UNITED STATES

No. 45283

S. H. BERCH v. THE UNITED STATES

No. 45284

[Decided March 6, 1944]

On the Proofs

Income tax; capital gain; stock received in exchange on reorganization; stock in holding companies.—Under section 208 (a) (8) of the Revenue Act of 1926, in determining capital gain, the period during which stock of a holding company has been held by taxpayer may not be included "in determining the period for which the taxpayer has held property received on an exchange" in a reorganization where the holding company stock was first exchanged for stock in subsidiary companies which in turn was exchanged for stock in the new corporation.

Same; period for which stock was held.—Under section 208 (a) (8) of the statute "in determining the period for which the taxpayer has held property received on an exchange," plaintiff is concededly entitled to add on the period he held the stock of the two subsidiary companies to the period plaintiff held the stock of the new company which was received in exchange but he may not include the period during which he held the stock of a holding company, which held the stock in the two subsidiary companies.

Same; exceptions specified in section 201 (c) *of 1924 Revenue Act.*—The liquidation of the holding company of which plaintiff was the sole stockholder not being a part of the plan of reorganization, it does not come within the exceptions to section 201 (c) of the Revenue Act of 1924 which provides for the taxation of gain derived on liquidation.

Same; dissolution of holding company, not a necessary step in reorganization plan.—A provision in a sales contract prohibiting individuals indirectly owning stock in the subsidiary companies, including plaintiff, from engaging in business in competition

with the new company does not establish that the dissolution of the holding companies was a necessary step in the plan of reorganization since the holding companies had not been engaged in the competitive business for a number of years.

Same; timely amendment to claim for refund.—Where claim for refund was based wholly on the ground that the profit as computed upon the valuation fixed by the Revenue Agent was taxable as a capital net gain in 1925 instead of as ordinary income; and where in 1939 in a communication to the Commissioner of Internal Revenue, plaintiff advanced an alternative proposition that the value of the stock received in liquidation should become the basis of gain or loss in the subsequent sale of said stock; it is *held* that this 1939 communication cannot be considered a timely amendment to the claim for refund.

Same; taxpayer bound by agreement on valuation.—Aside from the statutory bar, as to the later grounds upon which recovery is asked, plaintiff is bound by the 1925 agreement as to the value of the stock received in liquidation. Plaintiff cannot in one year rely on one state of facts then thought to be to his advantage upon the basis of which an assessment is made, and in a later year reverse his position and allege that the facts were something else.

The Reporter's statement of the case:

Mr. Robert P. Smith for the plaintiff. *Mr. William Ristig* and *Messrs. Smith, Ristig & Smith* were on the briefs.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. S. H. Berch and Rose Berch, plaintiffs herein, now residents of the State of California, are husband and wife, and resided in the State of Washington during the year 1926 and prior thereto, a community property state which entitles the plaintiffs to compute their income on a community property basis by reporting one-half of the income in their separate returns.

2. The plaintiffs on April 16, 1927, pursuant to extensions granted, each separately filed with the Collector of Internal Revenue for their collection district separate individual federal income tax returns for the calendar year 1926, each reporting a gross income of $83,483.52, deductions therefrom amounting to $4,909.25 and net incomes subject to tax

of $78,574.27. These returns indicated that they were filed upon the community property basis; that the plaintiffs had a total gross income of $166,967.03, total deductions of $9,818.51 and a total net taxable income of $157,148.52; and that these several totals were equally divided between them and reported as aforesaid upon their separate individual returns.

One of the several items of community gross income aggregating $166,967.03 was an item of $125,366.98 reported on line 6 of each return as "Profit from Sale of Real Estate, Stocks, Bonds, etc.," and on Schedule C which was attached to and filed with each of plaintiffs' returns there appeared a calculation as follows:

Stocks	Amount received	Cost	Gain	Loss
50 Shs. Nat'l Cash Register "A" 1/6/26	$2,370.91	$2,500.00	----------	$129.09
80 Shs. General Motors 1926	10,020.00	9,480.00	$540.00	----------
300 Shs. General Motors	37,023.00	39,000.00	----------	1,977.00
400 Western Dairy Products "A" 1926	18,000.00	17,500.00	500.00	----------
11,000 Shares Western Dairy Products "B" 1925/26	137,376.62	10,700.00	126,676.62	----------
	204,790.53	79,180.00	127,716.62	2,106.09
	79,180.00	----------	2,106.09	----------
Net gain on stocks	125,610.53	----------	125,610.53	----------

There also appeared as part of Schedule C a further calculation showing a net loss on bonds of $243.55, and the net gain on stocks calculated as shown above to be $125,610.53 less the net loss on bonds of $243.55 produced the sum of $125,366.98 reported as aforesaid on line 6 of each of the plaintiffs' returns. Copies of the returns are in evidence and made a part hereof by reference.

The return of S. H. Berch reported a tax of $11,418.97 and that of Rose Berch a tax of $11,407.34. These amounts were timely assessed and were paid in five installments. The last payment by each taxpayer was made December 15, 1927.

On January 11, 1929, each plaintiff separately filed a formal claim for refund. Plaintiff S. H. Berch claimed a refund of $3,130, or "such greater amount as is legally refundable." It was based upon the privilege claimed by the taxpayer under section 208 of the Revenue Act of 1926 (44

Stat. 9, 19), providing for the taxation of the gains from the sale of capital assets held for more than two years at the rate of 12½ percent; whereas, it was stated that the returns filed had included this gain in ordinary income and the tax computed at the ordinary rate, resulting in a much larger tax than would have been due had the tax on the capital net gain been computed at 12½ percent. Mrs. Rose Berch claimed refund of $3,035, but the claim was based upon the identical ground asserted in the claim of S. H. Berch.

Both of the claims were formally rejected by the Commissioner of Internal Revenue, and plaintiffs were so advised by separate letters sent to them by registered mail on July 3, 1940.

3. During the time that the claims for refund for the year 1926 were under consideration by the office of the Commissioner of Internal Revenue and prior to the rejection of them, each of the plaintiffs on September 20, 1939, filed with the office of the Internal Revenue Agent in Charge at Los Angeles, California, a communication addressed to the Commissioner of Internal Revenue, setting forth under oath the following statement:

> Furthermore, we call your attention to the fact that the Class "B" stock of the Western Dairy Products Company which you have valued at 50¢ a share for the purpose of determining gain or loss had an actual value at the time of the exchange in 1925 of approximately $10.00 a share. The value of 50¢ per share was an arbitrary value fixed by the underwriters but the first sales of this stock in 1925 ranged from $5.00 to $10.00 a share. Consequently, the amount of $125,366.98 representing profit from the sale of this stock, as shown in your report, is overstated. If it is finally determined that the liquidation of the Berch Ice Cream Company in 1925 was not a part of the plan of reorganization, and constituted a taxable transaction, then the basis for determining gain or loss on subsequent sale of the stock received is the fair market value of the Class "B" stock of the Western Dairy Products Company, which ranged from $5.00 to $10.00 a share, and the arbitrary value of 50¢ per share cannot be used as a base. Full facts and information regarding the value of this Class "B" stock has previously been submitted to the Department and is on file in your office.

4. Part of the class A and class B stock of Western Dairy Products Co. was sold by plaintiff S. H. Berch during the year 1927 and the same issue herein involved was submitted to the United States Board of Tax Appeals, whose decision is reported in 35 B. T. A. 385. A timely appeal by the plaintiffs from the decision of the United States Board of Tax Appeals was taken to the Court of Appeals of the District of Columbia and during the pendency of the appeal in the Court of Appeals of the District of Columbia a compromise settlement of the deficiency tax and interest involved was entered into between the parties hereto and the office of the Attorney General for the United States. Plaintiffs' attorney thereafter dismissed their appeal pursuant to Rule 12 of the court's rules, and a certificate to that effect from the Court of Appeals dated December 9, 1938, was filed with the Board of Tax Appeals on December 10, 1938.

5. From October 1922, to August 5, 1925, S. H. Berch owned all of the stock of the Berch Ice Cream Company of Seattle, Washington. Berch Ice Cream Co. owned 20 percent of the stock of the Crystal Investment Company, the other 80 percent being owned by Kassel and Rebecca Gottstein Company, J. L. Gottstein, F. V. Fisher, and Associated Dairies, Inc. The Crystal Investment Co. owned all of the stock of the Velvet Ice Cream Company, Inc., and the Seattle Ice Cream Company, both located in Seattle, Washington.

6. During the latter part of 1924 Spencer Trask & Co., brokers, entered into negotiations with S. H. Berch for the purchase of the business of the Velvet Ice Cream Co. and the Seattle Ice Cream Co., with a view to creating an organization to handle all the dairy and ice cream business along the entire Pacific Coast.

7. On or about July 20, 1925, S. H. Berch secured an oral agreement with his associates, who owned 80 percent of the capital stock of the Crystal Investment Co., whereby they would sell all of the capital stock of the Seattle Ice Cream Co. and the Velvet Ice Cream Co. for an agreed consideration of $1,250,000, and Mr. Berch was to negotiate the sale.

8. On August 3, 1925, the owners of all the stock of the Crystal Investment Co. and Spencer Trask & Co. entered into an option agreement, which was called "Escrow Letter

and Contract" and was addressed to the Dexter Horton National Bank of Seattle. The agreement recited that Spencer Trask & Co. was given the right until October 15, 1925, to purchase all of the capital stock of the Velvet Ice Cream Co. and Seattle Ice Cream Co. for $1,250,000. Pursuant to this agreement, all of the stock of the Seattle Ice Cream Co. and Velvet Ice Cream Co., being 1,500 shares for each company, was deposited at the Dexter Horton National Bank at Seattle, Washington, in escrow.

9. On the same date, August 3, 1925, the same group of stockholders delivered to the escrow holder of the stock of the Seattle Ice Cream Co. and Velvet Ice Cream Co. an "Instruction Letter," authorizing the escrow holder to use $250,000 of the total consideration to buy class A stock of the proposed new corporation and to distribute such stock and the balance of the cash in the same proportions as set out in the letter above-cited. Berch's associates later decided not to take the $250,000 in stock but took all cash.

10. On the same date, August 3, 1925, S. H. Berch entered into a separate agreement with Spencer Trask & Co. which recited that Berch was to receive for his interest in the stock of the Seattle Ice Cream Co. and the Velvet Ice Cream Co. first issue of class A stock of the new company in the amount of $250,000 at the price per share paid for other first issue class A stock by Spencer Trask & Co. for their allotment of said stock, and 35% of the total first issue class B stock of the new company, plus additional class A stock of the new company, to the value of $20,000.

11. Also on August 3, 1925, S. H. Berch, J. L. Gottstein, F. V. Fisher, Frank R. Burns, and A. Shumanski entered into an agreement with Spencer Trask & Company that after the stocks of the Velvet and Seattle ice cream companies were purchased by them the individuals named would not engage in the manufacture or wholesaling of ice cream within the State of Washington for five years, nor within such time and place be a stockholder or officer of or otherwise associated "with a corporation engaged primarily in the manufacture or wholesaling of ice cream."

12. The first issue of stock of the new company was to consist of 80,000 shares of class A (nonvoting) stock and

116,000 shares of class B (voting) stock. Spencer Trask & Co. were to buy the class A stock at $40 per share and sell to the public at $45 per share. Berch's portion of the issue of class A stock amounted to 6,750 shares and of the class B stock 40,600 shares, which he agreed to take in exchange for his interest in the stock of the Seattle Ice Cream Co. and Velvet Ice Cream Co. The reference in the Instruction Letter (Finding No. 9) to the purchase of $250,000 worth of class A stock is not the same stock that S. H. Berch was to receive as referred to in the separate agreement (Finding No. 10), but is in addition thereto for the benefit of S. H. Berch and his associates. Berch's associates decided not to take the $250,000 in stock and took all cash so that the said class A stock referred to in the Instruction Letter (Finding No. 9) was never purchased by Berch or his associates.

13. Mr. Davenport, representing Spencer Trask & Co., bankers, came to Seattle on August 2, 1925, and after examining the earning statement of the Seattle Ice Cream Co. and the Velvet Ice Cream Co. was anxious to close the deal and the agreements were signed by the parties on August 3, 1925. Immediately thereafter, Mr. Davenport stated he was satisfied with the deal and that his company was going through with the transaction, and thereupon directed and ordered Berch to dissolve the Crystal Investment Co. and the Berch Ice Cream Co. and pursuant to said instructions on August 5, 1925, the Crystal Investment Co. was, by appropriate corporate action, ordered dissolved and the stock which it owned in the Seattle Ice Cream Co. and Velvet Ice Cream Co. was distributed to its stockholders. On the same date, after the dissolution of the Crystal Investment Co. the Berch Ice Cream Co., which owned 20 percent of the stock of the Crystal Investment Co., was dissolved and its assets distributed to Mr. Berch, who owned all of the stock of the Berch Ice Cream Co. The only asset of the Berch Ice Cream Co. was its stock in the Crystal Investment Co. The final orders dissolving the Crystal Investment Co. and Berch Ice Cream Co. were issued November 4, 1925.

14. On or about August 10, 1925, all of the stock of the Seattle Ice Cream Co. and the Velvet Ice Cream Co.

was deposited with the Dexter Horton National Bank in escrow. Spencer Trask & Co. also deposited $10,000 in accordance with the terms of the Escrow Letter and Contract.

15. Under date of August 25, 1925, Spencer Trask & Co. issued instructions to the Dexter Horton National Bank informing them that $1,250,000 would shortly be deposited with them to take up the stock of Seattle Ice Cream Co. and Velvet Ice Cream Co., and instructed them not to pay S. H. Berch his share because of a separate agreement with him.

The aforesaid amount of money, that is $1,250,000, was deposited August 26, 1925, and the Dexter Horton National Bank was ordered to distribute $1,000,000 less $10,000 to S. H. Berch's associates, leaving S. H. Berch's stock in the Seattle Ice Cream Co. and the Velvet Ice Cream Co. and his interest in the consideration still in escrow with the bank.

The associates of S. H. Berch elected to take all cash and did not buy any of the class A stock, as provided by the Instruction Letter, by reason of the fact that the new company intended to issue bonds.

16. Thereafter S. H. Berch was elected president of the Seattle Ice Cream Co. and the Velvet Ice Cream Co. and managed their affairs until October 8, 1925, when the stock of these companies was taken over by the new company, the Western Dairy Products Company. Western Dairy Products Co. was incorporated on October 1, 1925, whereupon S. H. Berch became its first president and has been president of the company since the date of incorporation.

17. From the period August 5, 1925, to October 8, 1925, the stock of the Seattle Ice Cream Co. and the Velvet Ice Cream Co. was owned by S. H. Berch and Spencer Trask & Co. and during that period of time they owned all of this stock.

The entire first issue of class A and class B stock of the Western Dairy Products Co. was issued to Spencer Trask & Co. and S. H. Berch. This consisted of 80,000 shares of class A stock, and 116,000 shares of class B stock, so that all of the stock of the new company was owned by Spencer Trask & Co. and S. H. Berch immediately after its organization.

Part of the aforesaid first issue of stock of the new company was exchanged for the stock of Seattle Ice Cream Co. and Velvet Ice Cream Co., and S. H. Berch, who was the owner of 20 percent of the stock of Seattle Ice Cream Co. and Velvet Ice Cream Co., was entitled to receive in exchange for his stock, in accordance with the separate agreement between S. H. Berch and Spencer Trask & Co., 6,750 shares of class A stock and 40,600 shares of class B stock. Instead of taking the full amount of class A stock allotted to him, Berch received only 2,250 shares of class A stock and gave up his rights to 4,500 shares of class A stock, receiving instead cash in the amount of $180,000. Consequently, the consideration actually received by Berch for his 20 percent interest in the stock of the Seattle Ice Cream Co. and Velvet Ice Cream Co. was as follows:

Cash	$180,000
2,250 shares	class A stock
40,600 shares	class B stock

The 4,500 shares of class A stock were given up by Berch by reason of the fact that the first issue of stock offered to the public was oversubscribed and there was not sufficient stock to cover the sales, so that Mr. Berch gave up part of the class A stock which he was entitled to receive.

18. The class A stock of the new company was nonvoting stock. The class B stock of the new company, which was the only voting stock, was placed in a voting trust, consisting of three trustees. S. H. Berch and his attorney, Mr. Campbell, constituted two of the trustees, the other trustee representing Spencer Trask & Co. Berch was also the president of the new company.

19. Mr. Berch's interest in the new company was approximately the same as his interest in the stock of the Seattle Ice Cream Co. and Velvet Ice Cream Co., namely, 20 percent, his interest in the stock of the new company being 21.75 percent.

Immediately after the signing of the agreements on August 3, 1925, the deal was closed by the parties and the attorneys were ordered to incorporate the new company, Western Dairy Products Co. The documents pertaining to the formation of the corporation were prepared and com-

pleted sometime in September 1925, and the corporation received its charter on October 1, 1925.

20. The exchange by S. H. Berch and Spencer Trask & Company of all the stock of the Velvet and Seattle companies for stock of the Western Dairy Products Company was a nontaxable exchange that came within section 203 (b) (2) of the Revenue Act of 1924 (43 Stat. 253, 256) as an exchange of stock in a corporate party to a reorganization for stock in another corporate party.

The dissolution of the Berch Ice Cream Company was not a step in the plan of reorganization and the gain derived on its liquidation, therefore, is subject to tax. It was so held by the Commissioner of Internal Revenue after an audit of plaintiffs' tax returns for the taxable year 1925, and this was acquiesced in by plaintiffs. This audit resulted in an additional assessment against Mrs. Rose Berch of $8,656.43, and an overassessment against S. H. Berch of $3,031.04. Mrs. Berch paid the additional assessment and Mr. Berch accepted refund of the overassessment.

In computing the gain derived upon the liquidation of the Berch Ice Cream Company and the Crystal Investment Company the stock received by plaintiff Berch in the Velvet Ice Cream Company and the Seattle Ice Cream Company was valued by the Commissioner of Internal Revenue at $258,000. The returns were filed on the community property basis, but the Commissioner held that a loss sustained by Mr. Berch was frõm property not held on a community property basis.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

In 1926 plaintiff S. H. Berch sold 11,000 shares of Class B stock of the Western Dairy Products Company. Plaintiffs filed separate individual income tax returns for the calendar year 1926 on a community property basis and the profit on the sale of this stock was returned as ordinary income. However, within two years from the time they paid their taxes they filed claims for refund on the ground that they were taxable on the profit received, not as ordinary

income, but as a capital net gain at the rate of 12½ percent. These claims were rejected and plaintiffs brought these suits.

1. The profit is taxable as a capital net gain only if the capital asset had been held by plaintiff Berch for more than two years. He had not held this particular stock for more than two years, but he claims the right to tack on to the period he had held this stock the period he had held other stock for which he says it was received in exchange.

Section 208 (a) (8) of the Revenue Act of 1926 (44 Stat. 9, 19) provides:

> * * * In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 204 the property received has * * * the same basis in whole or in part in his hands as the property exchanged. * * *

Section 204 provides it shall have the same basis if acquired in the manner described in subdivision (b), (d), (e), or (f) of section 203.

Subdivision (b) (2) of section 203, on which plaintiffs rely, deals with a case where "stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

Under these sections plaintiffs can add to the period plaintiff S. H. Berch had held the Western Dairy Products stock the period he had held other stock if, pursuant to a plan of reorganization, he exchanged this other stock for the Western Dairy Products stock.

The facts relative to his acquisition of the latter stock are these: Prior to August 3, 1925, the Crystal Investment Company had owned all of the stock of both the Velvet Ice Cream Company and the Seattle Ice Cream Company. Eighty percent of the stock of the Crystal Investment Company was owned by Kassel and Rebecca Gottstein Company, J. L. Gottstein, F. V. Fisher, and Associated Dairies, Inc. The other 20 percent was owned by the Berch Ice Cream Com-

pany, all of whose stock in turn was owned by S. H. Berch.

In July of 1925 S. H. Berch entered into an oral agreement with the other stockholders of the Crystal Investment Company to sell all the stock of the Velvet and Seattle ice cream companies, subsidiaries of the Crystal Investment Company, both his stock and theirs, for $1,250,000. Later, on August 3, 1925, Spencer Trask & Company, New York bankers, were given an option to purchase all of the stock of the Seattle Ice Cream Company and Velvet Ice Cream Company for $1,250,000. On the same date the plaintiff S. H. Berch entered into a separate agreement with Spencer Trask & Company, whereby he was to receive for his interest in the Seattle Ice Cream Company and the Velvet Ice Cream Company, held through the Berch Ice Cream Company and the Crystal Investment Company, not cash, but stock in the new company to be organized, to which the stock in the Seattle Ice Cream Company and the Velvet Ice Cream Company was to be transferred.

The option was exercised. The Crystal Investment Company was dissolved and its stock in the Velvet and Seattle ice cream companies was distributed to its stockholders. All of it, except that held by plaintiff, was transferred to Spencer Trask & Company for $1,000,000. The Berch Ice Cream Company was also dissolved, Berch receiving for his stock therein 20 percent of the stock of the Velvet Ice Cream Company and the Seattle Ice Cream Company.

From August 5, 1925, to October 8, 1925, all of the stock of the Velvet and Seattle companies was owned by plaintiff and Spencer Trask & Co., and all of this stock was transferred to the Western Dairy Products Company, organized on October 1, 1925, in return for stock of that company.

Plaintiffs are clearly entitled to tack on to the period S. H. Berch had held the Western Dairy Products Company stock the period he had held the stock of the Velvet and Seattle ice cream companies, as the Commissioner of Internal Revenue concedes, but this does not give them the necessary two years. In their petitions and briefs they treat the Berch Ice Cream Company stock and the stock in the Seattle and Velvet ice cream companies as one and the same, and claim the right to tack on the period S. H. Berch had held

the Berch Ice Cream Company stock, although this stock was not exchanged for the Western Dairy Products stock.

Corporate entities cannot be so completely ignored. Plaintiff S. H. Berch did not acquire the Velvet and Seattle ice cream companies' stock until August 5, 1925; prior thereto this stock was owned by the Crystal Investment Company; nor did plaintiff S. H. Berch own any of the stock of the Crystal Investment Company. Eighty per cent of it was owned by J. L. Gottstein, Kassel and Rebecca Gottstein Company, F. V. Fisher, and Associated Dairies, Inc.; the other 20 per cent was owned not by plaintiff Berch, but by the Berch Ice Cream Company. We cannot ignore the corporate existence of the Berch Ice Cream Company and the Crystal Investment Company and treat plaintiff as the owner, prior to the liquidation of these two companies, of the stock of the subsidiaries.

Plaintiff S. H. Berch acquired the Velvet and Seattle ice cream companies' stock as a result of the liquidation of the Berch Ice Cream Company and the Crystal Investment Company. By the liquidation of the Berch Ice Cream Company he exchanged his stock in that Company for 20 per cent of the stock in the Crystal Investment Company, and by the liquidation of the Crystal Investment Company he exchanged his 20 per cent of the stock in that company for 20 percent of the stock in the Velvet and Seattle ice cream companies.

If these two exchanges of stock in liquidation come within the provisions of subdivision (b) (2) of section 203, *supra*, it may be that plaintiffs can add to the period S. H. Berch held the Western Dairy Products stock the period he held the Velvet and Seattle ice cream companies' stock, plus the period he had held the Berch Ice Cream Company stock.

The Commissioner of Internal Revenue says the liquidation of neither the Berch Ice Cream Company nor the Crystal Investment Company comes within the provisions of the section because neither company was a party to the reorganization, and that, therefore, plaintiffs cannot tack on to the period S. H. Berch held the Western Dairy Products' stock the period he had held the stock in the Berch

Ice Cream Company. He says their dissolution were not steps in the plan of reorganization. This is the issue.

Spencer Trask & Company desired to establish a dairy products company which would handle ice cream and other dairy products throughout the Pacific Coast. To carry out this plan it decided to acquire the stock in the Velvet Ice Cream Company and the Seattle Ice Cream Company, two companies manufacturing ice cream in Seattle, Washington. As stated, all of the stock of these two companies was owned by the Crystal Investment Company. Some of the stockholders of the Crystal Investment Company wanted cash for their indirect interest in the Velvet and Seattle companies and plaintiff Berch wanted stock in the new corporation to be organized. Therefore, the most convenient thing to do appeared to be to liquidate the Crystal Investment Company and to transfer to its stockholders the stock it held in the Velvet and Seattle companies. This was done. Spencer Trask & Company then paid cash to those stockholders who wanted cash for their holdings, and issued stock in the newly organized corporation to plaintiff Berch who wanted this stock.

Plaintiff Berch held his stock in the Crystal Investment Company through the medium of the Berch Ice Cream Company. The stock in the newly organized company could have been issued to the Berch Ice Cream Company in exchange for its holdings in the Velvet and Seattle companies acquired through the liquidation of the Crystal Investment Company, and plaintiff Berch would have owned the stock in the newly organized company through the medium of the Berch Ice Cream Company just as he had owned the stock in the Crystal Investment Company through the medium of the Berch Ice Cream Company. The plan of reorganization, therefore, did not require the dissolution of the Berch Ice Cream Company; its dissolution was a purely voluntary act on the part of plaintiff Berch, not necessitated by the plan of reorganization.

This being true, it does not seem that its dissolution and the transfer of its holdings to plaintiff Berch come within the provisions of section 203 (b) (2) relied upon by plaintiffs.

The Berch Ice Cream Company was not a party to the plan of reorganization.

Had there been no plan of reorganization and plaintiff Berch had chosen on his own motion to dissolve the Berch Ice Cream Company and have it transfer to him its stock in the Crystal Investment Company, or the stock in the Velvet and Seattle ice cream companies acquired on dissolution of the Crystal Investment Company, it could hardly be said that such a transaction did not come within the provisions of section 201 of the Act which provides for the taxation of the gain incident to the distribution of the assets of a corporation on liquidation. If this is so, we see no reason why the gain should not be subject to tax merely because this company was dissolved at the same time that a plan of reorganization was being carried out, its dissolution not being a necessary step toward the consummation of that plan.

Plaintiffs, conceding that section 203 (b) (2) is applicable only if the dissolution of the company was a necessary step toward the consummation of the plan of reorganization (R. 34), undertake to show that it was a step in the plan because required by the provision of the contract prohibiting the individuals indirectly owning stock in the Velvet and Seattle companies from engaging in the ice cream business individually in the State of Washington for five years or from becoming an officer or stockholder in a corporation "engaged primarily in the manufacture or wholesaling of ice cream." But plaintiff Berch's ownership of stock in the Berch Ice Cream Company did not violate that provision of the contract because that company was only a holding company and had not been engaged in the business of manufacturing or wholesaling of ice cream for a number of years. So long as it did not do so this provision of the contract was not violated, notwithstanding plaintiff Berch's ownership of stock in it.

The dissolution of the Berch Ice Cream Company was not a necessary step in the plan of reorganization.

The Board of Tax Appeals (now the Tax Court) arrived at the same result in a case involving the sale of this Western Dairy Products stock in a later year. It said that the only agreement to which the Berch Ice Cream Company was a party was an agreement to sell, and that it was not a party

to the agreement of the plaintiff Berch to take stock in the newly organized corporation. Plaintiffs in their briefs in this court criticize this holding and say that Berch's individual agreement to take stock in the new company was necessarily made on behalf of the Berch Ice Cream Company. Suppose this is true; in that event the Western Dairy Products Company's stock would have been issued to the Berch Ice Cream Company. If the matter had stopped there, it is probable that no gain or loss would have been recognized; but it would not have stopped there. Berch wanted to acquire the stock in his own name. To do so he would have had to liquidate the Berch Ice Cream Company, as he actually did. We are unable to see why the gain realized from such a liquidation would not be subject to the tax, since it was not a step pursuant to the plan of reorganization, but a step beyond it. The plan of reorganization was complete when the stock in the Velvet and Seattle ice cream companies was transferred to the Western Dairy Products Company and the required amount of the stock of the latter company was transferred to the Berch Ice Cream Company.

The liquidation of the Berch Ice Cream Company not being a part of the plan of reorganization, it does not come within the exceptions to section 201 (c) of the Revenue Act of 1924 (43 Stat. 253, 255), which provides for the taxation of the gain derived on liquidation. It reads:

> (c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 202, but shall be recognized only to the extent provided in section 203. * * *

Since the transaction was not within the exceptions stated in section 203, the period of holding of the stock received on liquidation cannot be tacked on to the period the Western Dairy Products' stock was held.

This holding is in accord with an agreement between the parties with reference to the year 1925. The Commissioner

of Internal Revenue in auditing plaintiffs' returns for that year ruled that the liquidation of the Berch Ice Cream Company and of the Crystal Investment Company was taxable, and assessed Mrs. Berch with additional taxes of $8,656.43, and found an overassessment of $3,031.04 against S. H. Berch. Both parties acquiesced in the Commissioner's action.

Plaintiffs rely on a decision of the 2nd Circuit Court of Appeals in *Helvering* v. *Schoellkopf*, 100 F. (2d) 415, to support their statements that if the liquidation of the Berch Ice Cream Company was a necessary step in the plan of reorganization it would be nontaxable. This is conceded. Sections 201 and 203 so provide. Our holding is based upon our opinion that it was not a necessary step.

2. Plaintiffs' alternative proposition is: "If the liquidation of the Crystal Investment Company and the Berch Ice Cream Company in 1925 constituted a taxable transaction, then the value of the stock received in liquidation, which was exchanged for Class A and Class B stock of the Western Dairy Products Company, becomes the basis for determining gain or loss in the subsequent sale of said stock."

Plaintiffs are in no position to rely upon this ground because their claims for refund were based wholly on the ground that the profit as computed upon the valuation fixed by the Revenue Agent was taxable as a capital net gain instead of as ordinary income. In their claims they did not rely upon this alternative ground. This ground was first advanced on September 20, 1939, in a communication addressed to the Commissioner of Internal Revenue. This reads:

> Furthermore, we call your attention to the fact that the Class "B" stock of the Western Dairy Products Company which you have valued at 50¢ a share for the purpose of determining gain or loss had an actual value at the time of the exchange in 1925 of approximately $10.00 a share. The value of 50¢ per share was an arbitrary value fixed by the underwriters but the first sales of this stock in 1925 ranged from $5.00 to $10.00 a share. Consequently, the amount of $125,366.98 representing profit from the sale of this stock, as shown in your report, is overstated. If it is finally determined

> that the liquidation of the Berch Ice Cream Company in 1925 was not a part of the plan of reorganization, and constituted a taxable transaction, then the basis for determining gain or loss on subsequent sale of the stock received is the fair market value of the Class "B" stock of the Western Dairy Products Company, which ranged from $5.00 to $10.00 a share, and the arbitrary value of 50¢ per share cannot be used as a base. Full facts and information regarding the value of this Class "B" stock has previously been submitted to the Department and is on file in your office.

Plainly, this has no reference whatever to plaintiffs' position as set forth in their claims for refund and cannot be considered as an amendment thereof. When this communication was filed the statute had long since run and, therefore, plaintiffs are in no position to rely upon this ground. *Wrightsman Petroleum Co.* v. *United States*, 92 C. Cls. 217, certiorari denied, 313 U. S. 578; *Hanna Furnace Corp.* v. *United States*, 90 C. Cls. 439; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89.

But aside from the bar of the statute, we do not think plaintiffs are entitled to recover. Plaintiffs say that if the liquidation of the Berch Ice Cream Company and the Crystal Investment Company was taxable, they have a right in determining the gain from the sale of the Western Dairy Products Company stock to use as a basis the value of the stock of the Velvet and Seattle ice cream companies at the time it was received in liquidation and that this value was $670,000; but plaintiffs agreed on the settlement of their tax liability for 1925 upon the basis of a valuation of $258,000 for this stock, and they are, therefore, in no position now to say that the value of this stock was $670,000. If its actual value was $670,000, as now claimed, plaintiffs' tax liability for 1925 would have been much greater than that assessed, but the statute against the assessment of additional taxes for this year has now run. Plaintiffs cannot take a position which is to their advantage in one year, and then change their position in a later year when they find it to their advantage to do so. *Alamo National Bank* v. *Commissioner*, 95 F. (2d), 622, 623, certiorari

denied, 304 U. S. 577; *Naumkeag Steam Cotton Co.* v. *United States*, 76 C. Cls. 687, certiorari denied, 289 U. S. 749; *R. H. Stearns Co.* v. *United States*, 77 C. Cls. 264, affirmed 291 U. S. 54; *Daube* v. *United States*, 78 C. Cls. 754.

Plaintiffs are not entitled to recover on either ground set forth in their petitions. Their petitions, therefore, must be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM P. McELHANY v. THE UNITED STATES

[No. 45583. Decided March 6, 1944]

On the Proofs

Disability benefits under veterans' statutes not subject to claim of any creditor, including the Government.—Under the provisions of the statutes relating to veterans' compensation, it is *held* that compensation which has been duly awarded by the Veterans' Administration to a veteran of World War I for disability incurred in line of duty may not be withheld for the payment of the claim of any creditor, including any fine imposed upon such veteran by the courts of the United States. (U. S. Code, Title 38, section 426).

Payments under War Risk Insurance not subject to offset by Government for claim.—Payments admittedly due to a beneficiary under a War Risk Insurance policy are exempt from all claims of creditors, including any claim of the United States of any character, except a claim arising under the Veterans Benefit acts. 49 Stat. 607, 609.

Same.—Claims of the United States, as much as the claims of private creditors, come within the purpose of the veterans' statutes, which purpose is to preserve solely for the support of the veterans the benefits conferred by such statutes.

Same.—Only claims arising under the veterans' benefit statutes are excluded from the exemption conferred by such statutes.

Veterans' Administration has exclusive jurisdiction only of claims arising under veterans' benefit statutes.—The veterans' benefit statutes confer exclusive jurisdiction upon the Veterans' Administration on all questions of law and fact "concerning a claim for benefits" under these statutes but where a veteran's claim for benefits has been adjudicated by the Veterans' Administra-

tion, and its decision accepted by the veteran; and where the payments due under such decision are withheld by the Government on account of a claim other than one arising under the benefit statutes, the courts have jurisdiction of a suit by the veteran to recover the amount of payments so withheld.

Same; claim arising not under War Risk Insurance Act.—Under the War Risk Insurance statutes the District Courts of the United States have jurisdiction of controversies over a claimant's right to insurance but in the instant case there is no controversy over plaintiff's right to the insurance, which right has been adjudicated and is admitted; but the claim in the instant case arises from the act of the Government in withholding such insurance payments as an offset against a fine imposed by the courts for an offense outside the War Risk Insurance Act.

Same; jurisdiction of Court of Claims.—The Court of Claims has jurisdiction of a claim based upon the withholding by the Government of (1) disability benefit payments properly adjudged to be due to a veteran and (2) payments admittedly due under a War Risk Insurance policy, where the statutes under which such payments are due and payable are not involved in the claim in suit.

The Reporter's statement of the case:

Mr. Ashby Williams for the plaintiff.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. William A. Stern, II*, was on the brief.

The court made special findings of fact as follows, upon two stipulations of facts entered into between the parties:

1. Plaintiff, on May 20, 1937, was sentenced by the District Court of the United States for the Eastern District of Tennessee, Southern Division, to imprisonment for five years. It was further ordered that he pay a fine of $5,000 "in lieu of costs."

2. Plaintiff is a veteran of the World War and at the time of said sentence had been awarded, and, except insofar as the United States may have had a legal right to a set-off on account of the fine, was entitled to receive, under the laws of the United States relating to veterans, certain monthly payments of compensation for disability incurred in line of duty. The defendant, against the will of the plaintiff, deducted and withheld out of such monthly compensation payments, and

applied toward the payment of said $5,000 fine, the sum of $936.84, made up of the following deductions: $30.24 per month from August 1, 1937, through November 30, 1937; $23.94 per month from December 1, 1937, through September 30, 1938; $25.20 from October 1, 1938, through October 31, 1938; $26.46 per month from November 1, 1938, through April 30, 1940; and $15.00 per month from May 1, 1940, through September 30, 1940.

3. At the time of said sentence plaintiff had also been awarded, and, except insofar as the United States may have had a legal right to a set-off on account of the fine, was entitled to receive, as beneficiary under a policy of War Risk Insurance on the life of his deceased brother Benjamin V. McElhany, the sum of $28.75 per month to continue through October 18, 1938; but the defendant, against the will of the plaintiff, withheld such monthly payments from August 19, 1937, through October 18, 1938, and applied the same, aggregating $402.50, toward the payment of said $5,000 fine.

4. These amounts retained by the Government, aggregating $1,339.34, have been applied, by direction of the Comptroller General, to the payment of the $5,000 fine imposed on plaintiff, and are the only payments as yet made on account of that fine.

5. On June 13, 1941, Howard W. Breining, Assistant Administrator, on behalf of the Veterans' Administration, Washington, District of Columbia, wrote a letter to plaintiff, which was mailed and delivered to him, reading as follows:

> (a) Reference is made to your letter dated May 31, 1941 in which you advise of the receipt of a letter from the Comptroller General of the United States referring to the provisions of Section 5 of the Act of October 17, 1940, Public 866, which barred further collection from your compensation award as application on the fine of $5,000.00 imposed on you by the District Court of the United States, Eastern District of Tennessee.
>
> (b) In compliance with the request contained in your communication of May 31, 1941, that you be advised relative to amounts withheld from your compensation award and from the award of insurance of your brother, Benjamin V. McElhany, 19–I–38317, on which you were beneficiary, the following statement is furnished:

Compensation

(c) An amount of $30.24 was withheld monthly from August 1, 1937 through November 30, 1937.

(d) The compensation award was amended to $23.94 as of December 1, 1937, and an amount of $23.94 was withheld monthly from December 1, 1937, through September 30, 1938.

(e) Your award was again amended to $26.46 per month, effective October 16, 1938, and an amount of $25.20, covering payment from October 1, 1938 through October 31, 1938, was withheld.

(f) An amount of $26.46 was withheld monthly from November 1, 1938 through April 30, 1940.

(g) Your award was further amended to $15.00 per month, effective May 1, 1940, and payments for May, June, July, August, and September 1940, at the new rate of $15.00 per month, were withheld.

(h) The total amount of compensation withheld as application on the fine of $5,000.00 hereinbefore cited was $936.84.

Insurance

(i) Insurance at the rate of $28.75 per month was payable to you as beneficiary on the award of your brother, Benjamin V. McElhany, 19–I–38317. Insurance payments covering the period from August 19, 1937 through October 18, 1938 (14 months at $28.75), or a total of $402.50, was also withheld as application on the fine imposed on you.

(j) The Comptroller General of the United States advised under date of January 9, 1941, that a check for the aggregate amounts withheld prior to the enactment of the Act hereinbefore mentioned be drawn to the order of the Treasurer of the United States for covering into the Treasury under the receipt account "Miscellaneous Receipts (152280) Fines and Penalties, All Others (Justice)." The Comptroller General in communication cited further advised that the Clerk of the Court should be apprised of the amount collected and applied against the unpaid fine. In accordance with this request the Clerk of the District Court of the United States, Eastern District of Tennessee, Knoxville, Tennessee, was advised under date of January 29, 1941, of the action taken.

(k) It is further noted in this connection that the Veterans Administration, Atlanta, Georgia, issued a Treasurer's check under No. 701454 on February 7, 1941,

for $936.84, Symbol 152280, for credit to the appropriation "Miscellaneous Receipts (152280) Fines and Penalties, All Others (Justice)." This check ($936.84) represented the total amount withheld from your compensation award over the period from August 1937 through September 30, 1940.

(l) A Treasurer's check for $402.50, covering the total amount of insurance withheld from the award of your brother, Benjamin V. McElhany, 19–I–38317, was issued under No. 42,986, dated February 1, 1941, as application to the fine previously described. This Treasurer's check was drawn also for deposit under the receipt account "Miscellaneous Receipts (152280) Fines and Penalties, All Others (Justice)."

(m) In connection with your request that an official receipt be furnished you covering the amount withheld from you as application on the fine of $5,000.00, you are informed that an official receipt may not be issued by this Administration covering the amount withheld from your compensation and insurance, as the deductions are not for application to an indebtedness of this Administration. However, it is believed that this letter which gives in detail the amounts collected will serve the purpose for which a receipt is desired. If not, it is suggested that contact be made with the Clerk of the District Court of the United States, Eastern District of Tennessee, Knoxville, Tennessee, with reference to a receipt covering the credit of the total amount, $1,339.34, applied against your fine.

(n) It may be added in connection with your statement that a letter was forwarded by you on or about March 25, 1941, to which no reply has been received, that no record has been found of the receipt of the communication referred to.

6. The United States has refused to return the said deductions to the plaintiff, or to credit him with the same except by applying it to the fine. No action has been taken by Congress and no other action has been taken by any Department of the Government on this claim except the following:

On April 28, 1938, plaintiff, acting in his own behalf and without counsel, filed in the District Court of the United States for the District of Columbia a "Petition for Injunction and/or Order of Restraint" against the Comptroller General of the United States and the Administrator of Veterans Affairs. On May 17, 1938, the separate answer of the Direc-

tor of Veterans Affairs was filed. On May 19, 1938, the separate answer of the Acting Comptroller General of the United States was filed. On June 23, 1939, both defendants moved for summary judgment dismissing the petition and filed a brief entitled "Defendants' Points and Authorities in Support of Motion for Summary Judgment." Thereafter, on June 30, 1939, plaintiff moved for summary judgment and filed his brief in the case. On August 29, 1939, the District Court ordered that plaintiff's motion be denied, that defendant's motion be sustained, and that the complaint be dismissed, whereupon the complaint was dismissed.

The court decided that the plaintiff was entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court: It is stipulated that plaintiff is a disabled veteran of World War I and as such is entitled to compensation in the amount of $936.84. It is also stipulated that he is entitled to $402.50 as the beneficiary of a War Risk Insurance policy on the life of his brother, another veteran of World War I. These sums are being withheld from him, however, because the defendant asserts the right to offset them against a fine of $5,000 imposed on plaintiff for violation of the White Slave Act. He sues to recover them.

We think it is clear that the right of offset is denied by the Act of August 12, 1935 (49 Stat. 607, 609). That Act plainly manifests the purpose of preserving for the support of the veteran all benefits under the War Risk Insurance Act, whatever his financial obligations or desires. It makes them nonassignable, exempts them from taxation, and makes them immune from all creditor process.

Obviously claims of the United States come as much within the purpose of the statute—to preserve the benefits for the support of the veteran—as the claims of private creditors, and, therefore, although the sovereign was not expressly named, it would seem its claims would be included therein. It was evidently so intended because the benefits are made expressly exempt even from the sovereign's claim for taxes. If exempt from such a claim, it would seem they would be exempt from all. Indeed the Act provides for only one de-

mand to which they are subject, that is one due the "United States arising under such laws," to wit, the veterans' benefit Acts. This is the only exception made. Under a familiar maxim it is to be presumed no other one was intended.

The question here presented was not discussed in *O'Leary* v. *United States*, 82 C. Cls. 305.

We must conclude, therefore, the defendant is not entitled to the set-offs claimed.

It is said, however, that we have no jurisdiction to render judgment for the compensation claimed because of the provisions of the World War Veterans Act of 1924 (43 Stat. 607; Title 38 U. S. C. sec. 426), the Act of March 20, 1933 (48 Stat. 8, 9), and the Act of October 17, 1940 (c. 893, sec. 11, 54 Stat. 1193, 1197). These Acts make the decisions of the Administrator of Veterans' Affairs final and conclusive on all questions of law and fact "concerning a claim for benefits" but plaintiff is not contesting the Administrator's decision on his claim for benefits. He accepts it and sues on it. What he does question is the action of the Administrator and the Comptroller General in doing something outside of the veterans' Acts, the setting off of amounts admittedly due him under those Acts against an extraneous demand against him. The right to decide such a question is not conferred on the Administrator.

Jurisdiction is conferred on the District Courts of controversies over a claimant's right to insurance; but there is no controversy here over the insurance to which plaintiff is entitled; it is over the right to appropriate the amount of insurance admitted to be due to satisfy a claim arising outside the Act.

We think our jurisdiction is clear. Plaintiff is entitled to recover the sum of $1,339.34. Judgment for this amount will be rendered. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

I think this court does not have jurisdiction to decide the questions here involved. As to the claim of compensation for disability, which accounts for $936.84 of the total claim, section 11 of the act of October 17, 1940, 54 Stat. 1197, as

amended, 38 U. S. C. 11 a–2, uses the broadest possible language to give finality to the decisions of the Administrator of Veterans' Affairs. It says:

> Notwithstanding any other provisions of law, except as provided in Section 445 of this Title, as amended, and in Section 817 of this Title, the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.

The comparable sections prior to 1933 had not specifically denied any jurisdiction to the courts to review the Administrator's decisions, and the Supreme Court of the United States, in *Silberschein* v. *United States*, 266 U. S. 221, 225, had said that there might be such review in cases where the Administrator's decision was contrary to law, or not supported by evidence, or capricious. Section 5 of the act of March 20, 1933, 48 Stat. 9, 38 U. S. C. 705, specifically provided that "no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." The Supreme Court said, in *Lynch* v. *United States*, 292 U. S. 571, 587, that the purpose of this language "appears to have been to remove the possibility of judicial relief in that class of cases even under the special circumstances suggested in * * * *Silberschein* v. *United States* * * *."

In 1939 the Court of Appeals for the District of Columbia decided the case of *Hines, Adm'r.* v. *United States ex rel, Marsh*, 105 F. (2d) 85, adversely to the Administrator, on the ground that his decision there under review did not fall within those titles of the Veterans' Act as to which his decisions had been made final. The act of 1940, quoted above, followed, and the court which decided the Marsh case held, in *Van Horne* v. *Hines, Admr.*, 122 F. (2d) 207, 208, that that act "clearly was intended to stop up the gaps created by that [the Marsh] decision."

I recount this history to show the settled policy of Congress to deal with the question of gratuities to veterans by legislation and administrative action, and to keep them out of

the courts. The Administrator could, with impunity, deny payments of compensation to a veteran for no reason at all. If so, I think he can deny payments because, in his view, the payments should be diverted to the liquidation of a fine which stands against the veteran.

As to the $402.50 of the plaintiff's claim which consists of payments allegedly due him under a War Risk Insurance policy on the life of his brother, the applicable statutes do not make the Administrator's action final. Section 445 of 38 U. S. C., which section is referred to as an exception to the provisions of section 11 a–2, quoted at the beginning of this opinion, provides:

> In the event of disagreement as to claim * * * under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies.

I think this language is plain, and that it furnishes an adequate remedy which our assumption of jurisdiction will merely duplicate. A refusal to pay insurance because of an asserted set-off is, I think, a "disagreement as to [a] claim * * * under a contract of insurance," and therefore falls within the language of section 445.

JONES, *Judge*, took no part in the decision of this case.

ANASTASIO A. YLAGAN v. THE UNITED STATES

[No. 45948. Decided March 6, 1944]*

On Defendant's Motion To Dismiss

Statute of limitation; the statute is not tolled by failure of other remedies.—The statute of limitation with respect to suits filed in the Court of Claims (U. S. Code, Title 28, section 262) is not tolled by the failure of other supposed remedies than suit in the Court of Claims.

*Plaintiff's petition for writ of certiorari denied June 12, 1944.

Same.—The claim in suit in the instant case first accrued when it could first have been definitely ascertained and set up, and plaintiff's unsuccessful efforts to collect from Government agencies and in other courts do not toll the statute of limitation. See *Smith* v. *United States*, 98 C. Cls. 392, 396, 397; *Moriarty* v. *United States*, 97 C. Cls. 338.

Mr. Anastasio A. Ylagan, pro se.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes before the Court on the defendant's motion to dismiss.

Plaintiff alleges that he was employed by the defendant as a janitor in the Post Office at Los Angeles, California, and under such employment worked continuously from July 1, 1929, to July 7, 1935; that he was entitled to an entrance salary of $1,320 per annum; that he was only paid $1,020 the first year, then raised to $1,080 per annum, which is the maximum he has received; and that he was erroneously removed from office (July 7, 1935) by the new postmaster.

The petition was filed September 4, 1943, and the motion to dismiss invokes the statute of limitations, section 156, Judicial Code, U. S. C., Title 28 § 262, and relies upon some other matters not necessary here to consider.

The plaintiff admits that his petition was not filed within the six-year limitation of the statute, but seeks to avoid the effect of the statute by setting forth the industry with which he pursued what he honestly believed to be his remedies, viz, claims or complaints to the Civil Service Commission, the Postmaster General, the Congress, the Comptroller General, the Treasury Department, and others, and suits in other courts, all to no avail, and argues that the statute did not begin to run until July 11, 1941, when, as he alleges, his last suit against the United States was dismissed for lack of jurisdiction.

Section 156 of the Judicial Code provides:

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the

court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. * * *

The claim here in suit first accrued when it could first have been definitely ascertained and set up. This occurred not later than the year 1935, and the claim is therefore forever barred. The effect of the statute, which applies specifically to this Court, is not tolled by the failure of other supposed remedies.

As to the date from which the statute of limitations begins to run, see *Smith* v. *United States*, 98 C. Cls. 392, 396, 397; and *Moriarty* v. *United States*, 97 C. Cls. 338.

Defendant's motion to dismiss is granted and the petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

JACOB DVORKIN v. THE UNITED STATES.

[No. 45912. Decided April 3, 1944] *

On Defendant's Demurrer

Government salary applicable to office to which appointment is made, independent of duties performed.—Following the decision in *George L. Coleman* v. *United States*, 100 C. Cls. 41, it is *held* that an employe of the Government is entitled to receive only the salary of the position to which he has been appointed.

Mr. Fred B. Rhodes for the plaintiff. *Rhodes & Rhodes* were on the brief.

Mr. J. R. Wilheim, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Enoch E. Ellison* was on the briefs.

The facts sufficiently appear from the opinion of the court, as follows:

PER CURIAM: Plaintiff sues to recover the pay of a driver-mechanic. He was paid the wages of a garageman-driver.

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*Plaintiff's motion for new trial overruled May 1, 1944.
Plaintiff's petition for writ of certiorari pending.

We held in *George L. Coleman* v. *United States*, 100 C. Cls. 41, that an employee of the Government was entitled to receive only the salary of the position to which he had been appointed. Plaintiff's petition does not allege he was appointed a driver-mechanic, but he says his bill of particulars does.

He does say therein "The claimant was duly appointed as a driver-mechanic," but he explains this by alleging that upon "assignment to the Post Office Department for duty" he was required to take an examination as a driver-mechanic before being allowed to perform any work, and by inference he alleges he performed the duties of a driver-mechanic. From this he argues: "The act of requiring claimant to take a non-competitive examination as driver-mechanic before being allowed to work and his assignment to the duties of the classification for which he had successfully passed an examination constituted his appointment as driver-mechanic."

This is contrary to our opinion in the *Coleman* case. There we held the determinative test of a person's right to salary was not the duties performed, but the position or grade to which appointed. Plaintiff avoids alleging the character of his "assignment" to the Post Office Department. This is the determinative question.

The demurrer is sustained, and the petition is dismissed. It is so ordered.

INTERNATIONAL ARMS & FUZE COMPANY, INC. v. THE UNITED STATES

[No. 42846. Decided April 3, 1944]

On the Proofs

Claims arising out of World War I contracts, under special jurisdictional act; cancellations under Act of June 15, 1917.—Under the provisions of the Act of June 15, 1917 (40 Stat. 182), authorizing the President to suspend or cancel contracts for war materials and to make "just compensation therefor," the cancellation thus authorized was not a breach of the contract by the Government but was a taking, for the public benefit, of the contractor's rights under the contract. *DeLaval Steam Turbine Co.* v. *United States*, 284 U. S. 61, and other cases cited.

Syllabus

Same; authority of Court of Claims under special jurisdictional act.—Under the provisions of the special jurisdictional act (48 Stat. 1452) the Court of Claims was authorized to determine what expenditures were reasonably made by the plaintiff which were fairly attributable to the two contracts in suit, and to what extent, if any, such expenditures exceeded the amounts already paid to the plaintiff in connection with those contracts; and the questions involved are largely questions of fact.

Same; salaries of corporation officers fixed by themselves as owners.—Where the officers of the plaintiff corporation were the sole owners of its stock the salaries paid to the officers, which salaries were fixed by the board of directors composed of or controlled by such officers; such salaries represented payment to themselves as individuals what they owned as owners of the corporation, but where it is sought to collect these salaries out of the treasury of the United States, as in the instant suit, the matter becomes the concern of the Government and necessitates inquiry as to the reasonableness of such salaries.

Same; "just compensation" under Act of June 15, 1917.—The "just compensation" directed by the Act of June 15, 1917, included so much of the unauthorized portion of the investment in plant and machinery which the contractor had reasonably made to enable him to perform the contract as would have been amortized if he had been permitted to complete his performance, and the reasonable cost to him of materials acquired for the performance of the contract. *Barrett Company* v. *United States*, 273 U. S. 227.

Same; anticipated profits not included.—Under the Act of June 15, 1917, "just compensation" did not include anticipated profits. *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106; *Russell Motor Car Co.* v. *United States*, 261 U. S. 514.

Same; legislative history of special jurisdictional act.—The legislative history of the special jurisdictional act of June 26, 1934 (48 Stat. 1452), under which the instant suit was brought, shows that it was the intention of the Congress that the case should be tried "upon the basis of just compensation or an operating-loss basis," as stated in the report of the House committee on the bill. (S. 2809).

Same; conclusions of the Court.—Upon the facts as found by the Court, it was *held:*

1. That the claims of the plaintiff have not been established by the evidence adduced and the plaintiff is not entitled to recover.

2. That the counterclaim of the defendant has not been sustained on its merits.

3. That the plaintiff did not commit fraud in the presentation and proof of its claims, growing out of the contracts in the instant suit, before the claims board and the War Department, under the Dent Act (40 Stat. 1272).

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Messrs. Herman J. Galloway, George Gordon Battle, Paul E. Haworth,* and *King & King* were on the brief.

Mr. D. B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant.

The court made special findings of fact as follows:

1. This suit is brought by the International Arms & Fuze Company, Inc., of Maine, under the provisions of Private Act No. 397, 73d Congress, approved June 26, 1934, entitled, "An Act conferring jurisdiction upon the Court of Claims to hear and determine the claims of the International Arms and Fuze Company, Incorporated," and reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims, notwithstanding the lapse of time or any statute of limitations or any defense because of any awards previously made by the War Department or other authority of the United States or any alleged acceptances thereof by the International Arms and Fuze Company, Incorporated, to hear and determine, upon the basis of just compensation, the claims of the said International Arms and Fuze Company, Incorporated, growing out of contracts numbered G-1048-559-A, dated January 1, 1918, and P-19219-4797-A, dated November 5, 1918, with the United States and the amendments and modifications thereof: *Provided, however,* That from any decision or judgment rendered in any suit presented under the authority of this Act a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.
>
> Approved, June 26, 1934.

2. By merger and change in corporate name duly made, plaintiff herein has become entitled to all rights and interests growing out of the transactions relating to the manufacture of shell, hereinafter narrated and referred to in the special jurisdictional act quoted in finding 1. Plaintiff did not take its present name until March 6, 1918. In these findings the word "plaintiff" is used to designate

either plaintiff under its present name or a predecessor to whose interests plaintiff has succeeded.

3. The contracts G–1048–559–A and P–19219–4797–A (hereinafter for convenience referred to as the "G" contract and the "P" contract), which are the basis of the claims of plaintiff, and which claims are the subject of the special act quoted in finding 1, related to the machining during the First World War of artillery shell of 155-millimeter calibre, from steel forgings supplied by the United States to the contractor.

4. Plaintiff, having manufactured at its Bloomfield, N. J., plant various munitions, principally 21-second fuses, for the British Government, undertook also, upon the entry of the United States into the war, to manufacture articles under contracts with the United States, and many of these contract operations were carried on simultaneously at the same plant, as shown by a list thereof in evidence as plaintiff's exhibit No. 28, made a part hereof by reference.

The "G" Contract (G–1048–559–A)

5. November 9, 1917, plaintiff addressed a formal tender to the War Department for the machining of one million shell, as follows:

ATTENTION OF MAJOR L. GRAND

1. The International Arms & Fuze Co. will undertake the machining and finishing of one million 155-mm. Mark I common steel shell before September 1st, 1918, at a price of $11.50 each. The shell referred to is the one made from the forging shown by drawing 75–20–4 revised October 31st, 1916, and specified in Ordnance Office Specifications dated October 18th, 1916, and amended September 21st, 1917.

2. This tender is made for shell of Class B steel not heat treated. Treated shell will, however, be made if the Department requires it after the process has been developed to a satisfactory basis.

3. It is understood that the United States will furnish the necessary steel forgings in accordance with the requirements of our output and also the transit plugs and packing boxes and crates and copper bands. We are to furnish the labor, gauges, and machining facilities.

4. The projectiles will be delivered f. o. b. our siding at Bloomfield, N. J., by us, and the components furnished by the Government are to be furnished f. o. b. the same point.

5. To carry out the above work we propose to provide the best facilities in addition to those now available, and these have been lined up.

6. The program of manufacturing is as follows:

November	0
December	0
January	25, 000
February	60, 000
March	100, 000
April	150, 000
May	175, 000
June	175, 000
July	175, 000
August	140, 000
Total	1, 000, 000

7. The above schedule is based on the understanding that the forging and other components supplied by the United States will be delivered in quantities sufficient to assure us of 30 days' supply ahead of machining at all times, thus permitting us to maintain continuous production and to utilize efficiently the labor and capacity provided.

8. In order to meet the schedules and conditions of labor it is requisite (as suggested by you) that a mutual agreement be consummated forthwith covering the above conditions and advance payment.

Attached to this tender was an estimate of the production machinery, motors, tools, gauges, trucks, skids, hoists, toolroom equipment, etc., that the plaintiff would have to acquire in order to perform a contract for machining 7,500 shell per day of 20 hours. In addition to the cost of this equipment, the estimate also included the costs of erecting a new plant building, heating and lighting it, and installing machinery in it. This estimate amounted to approximately $2,422,789.

6. This tender was not accepted by the Government, and Major Grand informed W. J. Hawkins, of the plaintiff company, that he did not want to be tied up with a contract for 1,000,000 shell but preferred to wait to see how the company might make out on an order for 500,000. November 15, 1917, Major Jamieson, of the Production Section, addressed a communication to the Purchase and Contract Section, in

which he recommended that plaintiff be given a contract for machining approximately 500,000 155-mm. shell and stated that he thought plaintiff should plan to develop its capacity for production of at least 5,000 shell per day, and in case it found that a greater capacity could be developed, it should receive reasonable assurance that additional orders would be placed in time to enable the company to continue its manufacturing operations to the reasonable limit of its capacity.

7. November 17, 1917, plaintiff telegraphed Colonel O'Hern, of defendant's Gun Division, as follows:

> What components of six-inch shell is it planned of contractors for machining shell supply all assembled I do not understand that the machining contractor has to supply or assemble the base cover shipping plug packing box and copper band or the adapter I do understand however that we furnish the rope grommet.

In answer to this telegram the defendant on November 19, 1917, telegraphed plaintiff as follows:

> Your telegram 17th to Colonel O'Hern. Contractor must do complete machining, including banding, attaching base covers, covering shell with antirust compound, and procure suitable shipping box and grommet or make other shipping provision to insure shells arriving at loading plant in as good condition as when accepted by Government at machining plant. Government will furnish all forgings, rough copper bands, and all base cover material.
>
> You are asked to bid on basis either of steel A (specifications with) full heat treatment, water quenching, full hydraulic and Brinell testing, or steel B (specifications with) full heat treatment, oil quenching, one hydraulic and one Brinell testing unit for use at inspector's discretion. Figure on that basis which produces earliest and largest output. In either case must make arrangement in lay-out of plant for space for later installment full hydraulic equipment.
>
> (Signed) COOK, "CROZIER."

8. November 25, 1917, the War Department sent the following procurement order to plaintiff. In the upper left corner there was the provision that the contract covering the order would be prepared upon receipt of the contractor's acceptance endorsed on the copy forwarded:

Procurement Order

War-Ord-G1048-559A GP471.16/2503

NOVEMBER 25, 1917.

Summary

Quantity

International Arms & Fuse Company, Bloomfield, N. J.___ 500,000
Price $11.50 per shell
Total, $6,500,000

Order for: Machining 155-mm.
Common Steel sheil.

GENTLEMEN:

1. Under the provisions of Section 120 of the Act of Congress relating to National Defense, approved June 3, 1916, an extract copy of which is enclosed, and other laws of the United States and the Executive Orders of the President of the United States, or Heads of its Departments, under which the requirements of advertisement for proposals are dispensed with; and referring to your proposal dated Nov. 9, 1917 (GP 471.16/1835), I am instructed by the Chief of Ordnance to hereby give you an order for the machining of Five hundred thousand (500,000) 155-mm. Common Steel Shell.

2. These shell are to be in accordance with "Specifications for Common Steel Shell," approved Sept. 21, 1917, and revised Oct. 18, 1917, and Ordnance Office Drawing, Class 75, Division 4, Drawing 25, last revised Oct. 24, 1917. A copy of the above-mentioned specifications is enclosed herewith and a brown print of the drawing will be sent you later.

3. The price to be paid you for the machining of these shell is $11.50 each, f. o. b. your plant. The United States will furnish forgings, copper bands, and base covers. You are to machine and band the forgings, attach the base covers, supply a wooden shipping plug, cover the shell with an antirust compound, and provide a suitable shipping box or make such shipping provisions as will assure the shell arriving at the loading plant in as good condition as when accepted by the Government at your machining plant. The above price is to be considered as your base price, it being understood that before you will be able to undertake this work for the United States it will be necessary and requisite for you to purchase and install additional equipment, the cost of which is estimated to be approximately $2,500,000, of which amount the United States agrees to purchase and own equipment up to and not to exceed the amount of $750,000.

4. Inspection of the shell ordered herein will be made by the Inspection Section, Gun Division, Albemarle Building, 24th Street and Broadway, New York, N. Y.

5. Delivery of the shell ordered herein will be as follows:

January 1918	25,000
February 1918	60,000
March 1918	115,000
April 1918	150,000
May 1918	150,000

6. The work and material covered by the foregoing order should be charged to the Chief of Ordnance, U. S. Army. You are requested to forward to this office triplicate copies of invoices.

7. Any communication in connection with this Procurement Order should make reference to GPWO 241–511G; War–Ord. G1048–559A; GPP. You are requested to notify this office of your acceptance of the above order by wire as well as by your endorsement on the enclosed copy.

Respectfully,

JAY E. HOFFER,
Colonel, Ordnance Dept. U. S. A.

GDP/BC
3 Enclosures.
Extract Copy of Sec. 120.
Instructions to Bidders.
Specifications for Steel Shell.

The original procurement order shows the endorsement of W. J. Hawkins, plaintiff's vice president. The date on which this endorsement was written does not appear. "Specifications for Common Steel Shell" of September 21, 1917, revised October 18, 1917, and "Instructions to bidders" are in evidence as plaintiff's exhibits Nos. A, A–1 to B, defendant's No. 559, and plaintiff's Nos. 81 and 83, and are made part hereof by reference.

9. November 28, 1917, a letter was written by C. F. Cook, Major, Ordnance Department, by Gordon Grand, to the International Arms & Fuze Company:

Subject: Change in specifications covering manufacture of shells.

1. I am directed by the Chief of Ordnance to advise you that the shells to be manufactured by you under the above referred to contract will be manufactured according to instructions and comments attached hereto.

(Attachment No. 1:)

Subject: Comments on Instructions concerning character of shells to be manufactured.

1. Your attention is directed to the fact that the specifications sent to you concurrent with the Department's invitation to you to make a proposal, which specifications were approved September 21, 1917, provided for the heat treatment of all shells.

2. You will note that the new instructions attached hereto state that manufacturers who are now equipped to heat-treat shells may do so at their option but are not required to so do, nor is it incumbent upon them to install heat-treating equipment for this work.

3. These attached instructions have been prepared in order to facilitate as much as possible your production of shells. If they are not thoroughly understood by you, the Department will be glad to confer with you immediately.

4. You are being advised at once respecting this change in order that you may be guided in the matter of new or additional heat-treating equipment which you may have planned to purchase and install.

5. It should be noted that under these instructions it is the Government's intention that there shall be furnished to the machining shops forgings which can be satisfactorily machined without heat treating.

6. On the other hand, it is suggested that all machine shops might properly consider being equipped with certain heat-treating equipment for use in the cases of improper forgings occasionally being sent them, or in the case of improper handling of the shell in the closing-in operations.

7. Your attention is directed to the fact that the instructions attached hereto will require certain adjustments in the price to be paid under the above contract. This matter will be taken up with you at a later date.

8. In this connection it should be noted that under these instructions the Government will not be obligated to pay the cost of heat treatment equipment, or the cost of its operation, since such heat-treating equipment will be used only to remedy injury done to the shells in the closing-in operation. This, however, will not affect any contract under the terms of which the Government has undertaken to purchase heat-treating equipment for the contractor as a part of the general equipment to be purchased by the Government or partially amortized by the Government, except that the Government will not consider purchasing or amortizing as extensive a

heat treatment equipment as contemplated under the old specifications.

(Attachment No. 2:)

Subject: Instructions concerning character of shells to be manufactured.

1. This Class "B" steel will have a carbon content not to exceed .62. Heat treatment is not obligatory, and will in general be used only when necessary to bring heats up to specification requirements.

2. Manufacturers who are adequately equipped to heat-treat shell may do so at their option. Such manufacturers should be used to absorb any class "B" steel that may require heat treatment or any Class "A" steel that may require heat treatment to give the equivalent of Class "B" requirements.

3. Manufacturers should be directed to proceed at once with the manufacture of shell as indicated above, and on the basis of the specifications revised this date.

4. One hydraulic testing unit and one Brinell testing unit at least will be installed in each plant to be used at the discretion of the Inspection Section.

5. In the case of new or additional equipment, the forging manufacturer should be called upon to provide sufficient apparatus to enable him to raise the tensile strength of the softer forgings produced and to raise the ductility of the harder forgings produced so that the reasonable degree of uniformity called for by the specifications may be afforded the machining contractor.

6. The preceding paragraph places the responsibility in general upon the forging manufacturer to produce forgings of the proper uniformity and of the proper physical qualities. It is appreciated that all forging plants are not now so equipped, and in connection with such forging plants the heat-treating plants of shell-machining contractors should be used as far as possible. In case of a shortage of proper heat-treating apparatus, the additional equipment should be placed in the forging plant and not in the machining plant.

10. On December 10, 1917, the following telegram of acceptance was sent by plaintiff to the War Department:

The International Arms and Fuze Company, Incorporated, accepts war order nine one thousand and forty-eight dash five fifty-nine A for five hundred thousand one fifty-five millimeter shell subject to correction of schedule of deliveries in accordance with agreement with

Major Grand and subject to flat price contract as also agreed with Major Grand and subject to advance of funds as also agreed.

In reply to this telegram of acceptance, General Crozier, on December 15, 1917, wired plaintiff confirming the fact that the contract was a flat price contract and asking that the Department be furnished with a schedule of deliveries that plaintiff would make. On December 18th, plaintiff replied by telegram as follows:

> Referring to schedule of deliveries on shell contract and your telegram of fifteenth Major Grand stated that shells must all be delivered before September first nineteen eighteen opposed schedule beginning February ten thousand thirty thousand sixty thousand one hundred thousand one hundred and fifty thousand all depending upon receipt of forgings.

11. February 28, 1918, the Ordnance Department wrote plaintiff of the possibility of requiring all shell to be given heat treatment and asked to be informed whether it had complete information as to the process of heat treating, oil quenching, and drawing after hardening; whether skilled help was available and whether plaintiff had furnace capacity for heating (to harden and draw); offered to be of assistance and stated that suggestions would be welcome.

April 13, 1918, subsequent to delivery of the formal contract, plaintiff wrote the Chief of Ordnance protesting against heat treatment of B steel. April 19, 1918, plaintiff asked the defendant to forego heat treatment, but stated that it was purchasing heat-treatment equipment. May 13, 1918, the Ordnance Department advised plaintiff that when specifications for shell were originally prepared it was believed that uniformly satisfactory results could be obtained from Class B steel without normalizing or heat treating, but that manufacturing conditions quickly showed that steel in the shell was frequently crystalline and of low ductility; also that there was a variation in quality in steel of various shell of the same mill heat and also in various parts of a single shell; that it was essential that shell be normalized; and that future specifications might provide full heat treatment of all steel.

12. January 22, 1918, plaintiff in writing asked the purchase section for a contract confirming the procurement order to manufacture the 500,000 155-mm. shell. Accordingly, the parties duly entered into a written formal contract, which is set forth in plaintiff's petition, page 8, as Exhibit A, being defendant's exhibit No. 559, which is hereby made part hereof. The contract is dated January 1, 1918, although the actual date of execution was during the period between February 18th and March 9, 1918. The contract provided that the contractor would machine, band, and attach base covers to 500,000 155-mm. common steel shell, at a unit price of $11.50 for each shell delivered to and accepted by the United States; that the work was to be performed in accordance with the specifications of October 18, 1917 (attached to the contract). The contract also provided that the United States would pay to plaintiff as partial reimbursement for the required additional facilities costing approximately $2,500,000 the sum of $750,000 and that title to such facilities so purchased should rest in the United States with the right of removal from the plant upon termination of this or any later contract. The deliveries provided in the contract were as follows:

March 1918	60,000
April 1918	80, 000
May 1918	80, 000
June 1918	80, 000
July 1918	100, 000
August 1918	100, 000

13. The machining specifications of October 18, 1917, which were the specifications attached to and made a part of the contract, provided:

1. *Material.*—The common steel shell will be machined and finished from forgings supplied by the Government as manufactured under current specifications for such material.

2. *Inspection of Forgings.*—Upon receipt of the forgings, the manufacturer will make inspection for defective forgings. Should any be found defective at this time or at any stage of the manufacturing, they will be referred to the Inspector, who will decide whether or not the manufacture (machining) will be continued or

whether such forgings will be laid aside to determine the responsibility for their defective condition.

* * * * *

6. *Rejected Shell.*—The machining contractor will reimburse the Government for the value of the forgings represented by shell rejected due to defects in heat treatment or machining operations for which he is responsible. The machining contractor will be reimbursed by the Government for the cost of work done on shell which are rejected due to defective material furnished by the Government, provided the requirements of Paragraph II have been satisfactorily complied with.

The contract contains the following provisions relative to forgings:

From Art. IV:

The United States agrees to furnish without cost to the contractor, forgings, copper bands, and base covers, base discs, and calking wire whenever and wherever the contractor shall call for delivery of the same. Such components shall remain the property of the United States, and the Contractor agrees to use due and proper care in the handling and storing thereof while in its control.

* * * * *

(3) Upon the completion of this contract the actual expense to the contractor of machining the steel forgings and copper bands furnished by the United States as hereinafter provided, which during the process of conversion develop defects, will be determined by the contracting officer, and such actual expense as determined and allowed will be paid by the United States to the contractor in addition to the contract price of the articles as hereinafter fixed.

Upon the completion of this contract the actual cost to the United States of steel forgings spoiled or destroyed through faulty workmanship in the contractor's plant will be computed by the contracting officer, and the total cost thereof will be charged against the contractor and deducted from any payments to be made to the contractor, or if no such payments remain to be made, the contractor shall immediately pay to the United States the cost of such forgings as determined by the contracting officer.

From Art. V:

It is recognized that a certain percentage of doubtful forgings may be saved and converted into good shell if

properly machined. In the interest of maximum economy of materials and work the Government recognizes this condition and will permit and favor private arrangements between the forging plants and machining plants whereby a certain percentage of such doubtful forgings may be sent to the machining plants to enable an effort to be made to save them. The percentage permitted and the question of what doubtful forgings will be permitted to be subjected to such treatment will rest with the contracting officer. Any expense of freight or work in connection with such forgings must be the responsibility of the contracting firms, except that the Government will consider any such forgings eventually saved and converted into accepted shell as delivered under the terms of this contract and will pay the contract prices and freight in connection therewith. This provision supplements but does not change or modify the provision in the specifications herein referred to relative to doubtful forgings.

14. Paragraphs 3 and 5, of the "Specifications for Common Steel Shell," of September 21, 1917, revised October 18, 1917, provide:

3. *Heat Treatment.*—In order to insure satisfactory control of the temperature, furnaces used in heat treatment of shell will be equipped with pyrometers satisfactory to the Inspector. The hardening of the shell in the heat-treatment process will be accomplished by using a spray applied simultaneously to the inside and outside of the projectile. The arrangements for hardening and for the subsequent drawing of the shell must be satisfactory to the Inspector as insuring uniformity of product * * *. After the shell are heat treated, the manufacturer will clean them thoroughly so as to free the inside surface from scale.

5. *Hydraulic Test.*—After finished machining, and before banding, every shell will be subjected to an interior hydraulic pressure of the amount prescribed in the table embodied herein. This pressure must be held for at least 15 seconds. This test must disclose no leakage, through the base or body of the shell and must not give a permanent enlargement beyond 0.001 per inch of caliber when measured on a diameter approximately ½″ below the lower edge of the bourrelet. Shell showing porosity or giving undue expansion in hydraulic test will be so mutilated, destroyed, or marked, in the presence of an inspector, as to prevent the possibility of being resubmitted for acceptance as service projectiles. * * *

These specifications were referred to in, and purported to be made a part of, the procurement order dated November 25, 1917, and the formal G contract dated January 1, 1918.

15. As of January 1, 1918, the "current specifications" for the manufacture of forgings to be supplied to plaintiff, were determined by Ordnance Department Drawing No. 75–20–4, dated September 8, 1917, in evidence as plaintiff's exhibit No. 2. A drawing showing the forging to be supplied to plaintiff is in evidence as plaintiff's exhibit No. 59. These exhibits are made part hereof by reference. These forgings were hollow steel cylinders with a closed base and weighed approximately 175 pounds from which approximately 100 pounds had to be taken off in the machining process.

16. Several subsequent changes in current specifications were made by the War Department after the revision of October 18, 1917, but no written order was ever given, after the execution of the formal contract, by any duly authorized contracting officer to the International Arms and Fuze Company to manufacture the shell in any manner other than in conformity with the revision of October 18, 1917.

17. As a result of the several writings hereinbefore referred to, there was a reasonable ground for doubt and controversy as to the extent to which plaintiff was bound, by its contract, to give heat treatment to the shell which it machined.

18. A supplemental agreement was executed by the parties dated January 3, 1918, providing for an advance by the Government to plaintiff of $1,000,000 in order to expedite the delivery of supplies under the contract which indebtedness was, under the terms of the agreement, evidenced by a demand note of the contractor, bearing interest at the rate of 5% per annum, endorsed by Rufus L. Patterson and John A. Harriss, who were treasurer and president, respectively, of plaintiff corporation. This money was to be repaid by deductions, by the disbursing officer of the Government, of $5.00 from the price of each shell delivered after the first 250,000 shell had been delivered.

19. A further advance of $725,000 was also made by the Government to plaintiff by a supplementary agreement dated March 21, 1918, for the same purpose, evidenced by plaintiff's

demand note bearing interest at 7% per annum and endorsed by Rufus L. Patterson and John A. Harriss.

Under the terms of this agreement the Government, through its proper disbursing officer, was to deduct from the gross face amount of each voucher presented by the plaintiff under the principal agreement, after the delivery of 250,000 shell, $9.00 for each shell and to apply that amount to repayment of the advance of $725,000 and interest and also the advance of $1,000,000, as set forth in supplemental agreement of January 3, 1918, referred to in finding 18. These advances were repaid by deductions made in accordance with the agreement of the parties, as modified by a subsequent agreement referred to in finding 20.

20. The G contract was further amended as follows:

August 29, 1918: Recognizing that the Government had requisitioned certain machines of the value of $85,887.40, which plaintiff had been unable to acquire by purchase, and had installed them in plaintiff's plant.

September 14, 1918: Reducing the original amount of $750,000 to be paid by the Government as partial reimbursement of cost of increased facilities to $664,112.60.

October 17, 1918: Changing the method of recoupment by the United States of the two advances of $1,000,000 and $725,000, respectively, so that no deductions would be made from the contractor's vouchers until after 325,000 shell had been delivered, and then the United States would deduct $10 on each shell thereafter until the total of $1,725,000 was recouped. (This amendment was made in connection with correspondence shown in finding 40.) The consent of the endorsers, Patterson and Harriss, of the notes referred to in finding 19, to the amendments of September 14 and October 17 was required and obtained. The United States was also given, by the amendment of October 14, the further right:

> * * * to deduct one hundred percent from the gross face amount of each voucher presented by the contractor in respect of payment for machinery and equipment purchased by the Government[1] from the contractor under the terms of a contract for machining 500,000 155-mm. H. E. shells which the Ordnance Department proposes to

[1] See findings 37–39, and 44, concerning this purchase of machinery from the plaintiff by the Government.

place with the contractor, as outlined in a letter to the contractor from the Projectile Section, Ordnance Department, dated October 14, 1918 * * *.

21. Plaintiff's plant in 1917 consisted of three main buildings known as A, B, and C, with certain adjacent buildings known as D. On or about November 25, 1917, or just prior thereto, when plaintiff was issued an order for 500,000 shell, it commenced tearing out partitions in the easterly end of A building, obtaining tools for installation of machinery, and lining up supplies for shell-manufacturing machinery. Up to approximately November 25, 1917, the date of the procurement order for 500,000 shell, plaintiff had made no changes in its plant other than indicated above.

Upon receipt of the procurement order some of the auxiliary small buildings known as D were torn down and were placed on a rented tract some distance away, known as Crow Hill. The small buildings not torn down and removed were converted into a First Aid Building for the new D plant.

22. Plaintiff was aware, before it made any changes in or purchased machinery for its plant, that its procurement order and contract would be for only 500,000 shell.

23. Early in 1917, plaintiff had purchased a great deal of machinery in the United States. It sold this machinery to its wholly owned Canadian subsidiary corporation, the International Manufacturing Company. The machinery was shipped to Montreal and was used there to equip the Canadian plant to perform a munitions contract for the British Government. When that contract was completed at the end of 1917 and the Montreal building sold, a considerable part of the machinery and equipment, including all of the toolroom equipment, was reshipped to plaintiff's plant at Bloomfield, New Jersey. This equipment had been in use for from about eight months to one year in Canada. The several items of equipment were resold to plaintiff, or charged on its books, at the original cost price, plus 35%, which 35% was made up of a 27½% import duty, and a 7½% war tax which had been paid to the Government of Canada when the machinery was sent there and installed. The Bloomfield company also paid the freight charges covering the return shipments. Where the equipment was particularly adapted to a contract

with the United States it was charged by plaintiff on its books to the expenses of that contract. Where it was general-purpose machinery like toolroom equipment or motors it was used as needed on the several United States contracts. Much of it was used on 21-second fuze contracts with the Government, of which plaintiff had several. Some of the contracts with the Government, on which some of this machinery was used, were cost-plus contracts.

24. In January 1918 plaintiff was prepared to begin the work of manufacturing shell to some extent, in part of the A building, but some delay was incurred at first because of the defendant's delay in furnishing plaintiff with forgings. After the first couple of lots of forgings came in during January, there was no further appreciable delay on that account.

In January 1918 plaintiff received a sample of 50 forgings from the Pressed Steel Car Company. They were found to be rather rough, reasonably free from scale, a little heavier than required, but fairly uniform. Plaintiff machined them. The next lot consisted of two carloads from Wm. Wharton Jr. & Company. They were crude with excessive scale outside and inside, and many were not boat-tailed. The Government inspector objected to them, but the defendant's District Ordnance Office authorized the contractor to machine them. The contractor had difficulties in machining them and so reported to the Government.

The Government furnished plaintiff a large number of forgings from various manufacturers that were not up to specifications. Some had exterior walls that were very rough and heavily pitted or coated with scale. Some had a like scaly condition on the inside all over the bore and were rough at the mouth of the bore. In some the scale was heavily caked at the bottom of the bore. Some were out of round and showed flat or semi-flat surfaces. Some had very heavy butts. In some the over-all length was above the specification length. Sometimes the bore was not centered and ran in at a slight angle. The interior bore shapes differed. Some were boat-tailed and others were not. Some base plugs were off center. Toward the end of performance of the contract, some

bell-mouthed forgings arrived. They had a wide taper in the mouth running back about four inches. Some forgings had segregated hard spots and, in some cases, hard streaks running the full length of the forging. Hard spots in forgings are, however, not unusual in making shell.

Of the 511,000 forgings machined approximately 220,000 had a carbon content of .53 and above with a proportionately high percentage of manganese. In addition, there were found among the lower carbon shell about 25,000 with hard spots in the bore and on the outer surface and base. This tended to break tools and retard production. There were also about 25,000 with very small bores necessitating the use of special tools.

25. In order to avoid machine and tool breakage when machining the forgings containing hard spots or hard streaks, it became necessary for the contractor first to anneal or soften them by putting them in an annealing furnace before machining them. After the annealing the forging was machined in part, and then had to be nosed in—that is the nose had to be heated to a cherry red so as to form the ogive of the shell. This nosing-in operation was normal and contemplated, and did not necessarily require a heat treatment but might have been attained by means of a hydraulic process, the method or process being optional with plaintiff.

After the nosing-in operation and machining, then as to many forgings a third heat operation was performed, to equalize any stress in the internal structure of the shell. Plaintiff found that the chemical mixture of the shell was so varied that some of the lots of shell had to be treated in a special way so as to bring up the elastic limit and tensile strength to the point required by the specifications.

The first and third operations, annealing and full heat treatment, so called, required by the defendant, could be accomplished with the same heating plant, to the extent of the capacity of the plant, that plaintiff had installed for annealing only.

26. Plaintiff applied limited oil quenching treatment to some shell. A large number were annealed and normalized, and full heat treatment was applied to some, but the evidence

does not show how many. However, heat treatment to whatever extent was necessary, was applied, the number of shell contracted for was completed, approved by defendant's representatives and accepted by the Government, and plaintiff was paid the purchase price therefor.

Approximately 40% of the forgings received by the contractor were hard, either throughout, or in spots, or were eccentric, or the surplus metal was unevenly distributed. Plaintiff endeavored to machine those forgings as they came in, where the indications were that they might be machined, but those that proved difficult caused breaking and replacement of tools to a considerable extent. This tended to retard production.

27. The work on the experimental fifty forgings received in January 1918 revealed that the power in A plant was insufficient and that the roof was not strong enough to support the necessary shafting, necessitating a reconstruction of the roof and other changes. Plaintiff's D building was not ready, and work in that building did not commence until about June of 1918. Seventy percent of the equipment for machining shell was in the D building. There was no material delay from nondelivery of forgings, except at the beginning, but there was delay because the plant was not fully prepared to machine forgings until the D building was ready. The unpreparedness of the plant also caused increased costs to plaintiff.

Plaintiff was caused considerable delay because of its failure or inability to install full heat-treating equipment earlier than it did. On July 25, 1918, plaintiff advised the defendant that it had already installed 4 heat-treating furnaces and was installing another at A building; that as soon as additional furnace capacity was installed it would be able to install the quenching apparatus then on hand.

September 11, 1918, plaintiff wrote the following letter to Colonel Jamieson, Chief of defendant's Production Division:

* * * * *

Further, regarding the 155-mm. shell, there was a young man here yesterday sent by Major Putnam of the Inspection Division who informed us that we should

have to quench and draw 100% of our output within ten days or two weeks or be shut down.

I feel sure that there must be some mistake in this matter as it would seem to contravene the contract and specifications entered into in good faith and as it would reduce your production to zero for several months until such an installation could be purchased and assembled. Regarding the need for 100% quenching and drawing, I invite your attention to a copy of a letter herewith which I wrote last night to Colonel Dillard. Incidentally we have been in consultation about this matter several times and I think he is clearly alive to the condition between the various marks of shell and to the needlessness of expending fuel, oil, labor, and money for the heat treatment of shell which already give without such treatment 100% results at the gun.

In this connection I am also enclosing a graphic statement of the stresses existing in the Mark I and in the Mark IV 155-mm. shell. It seems to me that these drafts taken together with the results of ballistic tests made to date should give decided pause to the enthusiasts for 100% heat treatment.

We are already normalizing and air quenching our output of 155-mm. shell 100% of the output being so normalized.

Occasionally there is a heat which cannot be brought up to 45,000 Elastic Limit by normalizing and air quenching and these heats, now two or three in number, have been set aside until we can install the oil tank which has a capacity of approximately 500 shells per diem. This limited oil-quenching equipment has not been installed to date on account of the necessity of rapidly expanding normalizing equipment which we had not expected to put in when our plant was first projected.

The remaining factor in the matter of heat treating is the supply of forgings of high-carbon content and in this respect we are completely covered, all of the forgings for the first contract having been delivered and are now on our premises.

To sum up, I cannot but think that we are making a mistake to harden and draw all common steel shell irrespective of the stresses set up in these shell in the gun. I can hardly see the necessity for it for the thin-walled shell where the unit stress in the gun is high but I cannot see it in the thick-walled shell where the unit stress is below the Elastic Limit now being obtained.

28. Power costs were increased because of difficulties with the forgings. The added heat-treatment process of normalizing installed by plaintiff added to the manufacturing costs. Labor man-hours were also increased due to eccentricities in the forgings.

Delays were experienced by the contractor by reason of the inability of the Public Service Corporation of New Jersey to furnish sufficient power because of a serious generator accident and other demands due to the war emergency, and priorities. Strikes of tool makers caused further delays. Difficulty in obtaining prompt delivery of certain machinery and also difficulties due to embargoes at times caused delays.

29. The amount of increased costs resulting from the delays and difficulties recited in the preceding findings is not shown by the evidence.

30. Plaintiff failed to meet its contract schedule for delivery of completed shell. However, no penalties were imposed by the Government for late deliveries.

31. Plaintiff wrote the Procurement Division two letters dated October 30, 1918. The first letter said:

> We are getting along pretty well towards the completion of our present 155-mm. shell contract. In the neighborhood of thirty (30) days we should be almost cleaned up, and unless the components for the next contract are assigned very soon, I am afraid that there will be a break between the two contracts. We have, as you know, another contract to commence on immediately the present one is finished, and I would like if you would advise us as quickly as possible who will supply us with the different components.
>
> It will probably take considerable time to get the forgings here after the order is placed. We would be pleased if you would take the matter up as soon as possible.

November 5, 1918, Major Day, Projectile Division, Ordnance Department, wrote the Production Division in connection with this letter, as follows:

> 1. Attached hereto please find copy of letter from the International Arms & Fuze Company, Bloomfield, N. J., regarding additional contract negotiated by this Section.
>
> 2. Please note that this Section has negotiated a con-

tract for 500,000 155-mm. H. E. Shells, Mark I, with the International Arms & Fuze Company. Print 75-4-25, last revised 7/26/18.

3. Owing to the fact, as you know, that we have been unable to secure funds for increased facilities, it is impossible for us, as yet, to put through contract, but it is the intention of this Section to do so as soon as possible. If you care to make shipments of components on the new contract, it will be satisfactory to us. Please, therefore, reply to the International Arms & Fuze Company's letter giving them your decision in the matter.

November 12, 1918, Major Day, of the Projectile Section, wrote plaintiff as follows:

1. The Chief of Ordnance directs me to refer you to your letter of October 30th, signed by the Superintendent of your Material Department, relative to having components for your next contract assigned in the near future, fearing lest there should be a break between the two contracts.

2. We have taken this matter up with Production Division, who inform us that owing to the present unsettled condition of affairs, they do not care to make any commitments.

32. Plaintiff's second letter, dated October 30, 1918, addressed to the Projectile Section of the Procurement Division, said:

Re: Order #G1048-559-A.

The above order calls for 500,000 155-mm. shells, and the War Department is to supply us with all the components for this quantity. On two occasions the whole quantity of copper bands has been allotted to us, but subsequently the number has been reduced by cancellations on the component manufacturers. This has happened recently, with the result that only 387,000 bands are now available and only 15,000 of these have still to be shipped to us.

As we are already nearly 75% through our order, it is obvious that we will shortly be out of copper bands, and we would, therefore, ask you to be kind enough to have allotted to us 150,000 bands to cover 500,000 plus another 25,000 for scrappage and defectives.

Your kind and prompt action in this matter will be greatly appreciated, as shortages similar to the above are continually curtailing our production on munitions.

November 1, 1918, plaintiff wrote the Procurement Division as follows:

> We are getting short of copper bands for the 155-mm. shell on our present order, and would ask you to please make arrangements for the prompt delivery of the balance of our order which is in the neighborhood of 100,000 copper bands. We do not want to run out of this material and have to close down our plant, and we would ask you for an early reply.

Again, on November 4, 1918, plaintiff wrote the Procurement Division as follows:

> We will require to complete our shell contract probably in the neighborhood of 15,000 extra 155-mm. Shell Forgings and 25,000 additional copper bands, base covers, lead discs, and caulking wires.
>
> Will you kindly let us know what the prospects are of this material being placed for immediate delivery? We would like to have a stock in hand immediately our supplies are exhausted, so that there will be no break in our contract.
>
> Can you give us any information regarding the components for our next contract?

November 23, 1918, The Projectile Section of the War Department wrote plaintiff:

> 1. The Chief of Ordnance directs me to acknowledge your letter of November 18th in which you state that no reply has been received in connection with material for your 155-mm. shell contract.
>
> 2. This matter was taken up with the Artillery Ammunition Section, who advised us that in view of the present situation they did not care to make arrangements to send us any large quantities of components for use in connection with your new contract.
>
> 3. This information has already been communicated to you.

33. At the time of the Armistice, November 11, 1918, plaintiff had approximately 13 different munition contracts with the Government, some of which had, before the Armistice, been suspended in an uncompleted state by the Government. After the Armistice, the Government directed plaintiff to suspend night work and eliminate all overtime work on the contracts in force, including shell. November

14, 1918, it wrote plaintiff that no further purchases for increased facilities would be approved—that this applied to increased facilities only and not to purchases covering plant operations.

34. December 9, 1918, the contracting officer wrote plaintiff as follows:

> 1. By direction of the Chief of Ordnance, you are requested in the public interest immediately to suspend further operation under your contract with the United States, War–Ord.–No. G1048–559A, except such operations as may be necessary to complete material now in process in your plant but in no case shall work continue beyond January 31, 1919, and to order no further materials or facilities, and except in cases of proved necessity, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract.
>
> 2. This request is made with a view to the negotiation of a supplemental contract providing for the cancellation, settlement, and adjustment of your existing contract, in a manner which will permit of a more prompt settlement and payment than will be practicable under the terms of said existing contract.
>
> 3. Please acknowledge receipt of this notice IMMEDIATELY and indicate your decision as to compliance with or rejection of this request. Forward your acknowledgment in duplicate to the District Office indicated below. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation.

December 13, 1918, plaintiff wrote the Procurement Division at Washington as follows:

> Referring to your suspension request on our order for machinging 500,000 Mark I 155-mm. common steel shell, War–Ord. G 1048–559A, I have to inform you that this order is almost completed.
>
> All of the shell have passed through the first operations and all of the material is therefore now in process and will be completed considerably before January 31, 1919; in fact, it is probable that the work will be finished in the month of December 1918.
>
> Judging by past experience in negotiating contracts, I doubt very much whether a supplemental contract can be negotiated, typed, approved, and consummated by

both parties in less than thirty days, and I therefore see no reason to hope for more prompt payment under a supplemental contract than we might obtain under the present contract, which is now binding on both parties.

Further, from your suspension request letter it appears that you have in mind the stoppage of all work on or before January 31, 1919, and that the accomplishment of this stoppage is the underlying purpose of the suspension letter. If that be the case, it would seem to be reasonable to permit the manufacturer to continue under the present contract when he can by so doing complete the work prior to January 31, 1919.

I have spoken to Mr. Roberts, Chief of the New York District Ordnance Office and he informs me he will have to get a special ruling on this case. We await your further communication in this matter with interest.

On about December 18, the Government instructed plaintiff not to finish any more forgings except such as were already at least 50% completed.

The contracting officer wrote plaintiff the following letter dated December 20, 1918, suspending the G contract:

1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend further operations under your contract or order with the United States, War-Ord. G 1048, except such operations as may be necessary to complete material now in process in your plant but in no case shall work continue beyond January 31, 1919, and to order no further material or facilities and, except in cases of proved necessity, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract or order.

2. This request is made with a view to the negotiation of a supplemental contract providing for the cancellation, settlement, and adjustment of your existing contract or order, in a manner which will permit of a more prompt settlement and payment than will be practicable under the terms of said existing contract.

3. This request shall not be operative until consented to in writing by any and all sureties, endorsers, or guarantors upon your obligations to the United States under this contract for performance, advance payment, or otherwise.

4. Please acknowledge receipt of this request immediately and indicate your decision as to compliance with or rejection of such request. Forward your acknowledg-

ment in duplicate to the District Ordnance Office indicated below. The above-mentioned consent should, in the event of your compliance, accompany the acknowledgment.

5. Upon receipt of such notice of compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation.

6. This supersedes letter of suspension of date December 9th, 1918.

35. November 28, 1918, plaintiff had completed 382,000 of the 500,000 shell under the G contract and was approximately 125,000 behind its schedule. At that time it had on hand 137,007 forgings. This supply of forgings never materially increased but dwindled until January 2, 1919, when the 500,000 shell had been completed. The P contract had not at this date been formally executed. Plaintiff then had left 15,102 forgings, 47,066 copper bands, and no base covers. It continued to use the remainder of the forgings on hand until the week of January 31–February 7, 1919, when it finally stopped work, having finished 11,808 surplus shell. No components were sent to plaintiff under the P contract, the defendant having declined to furnish them. The excess of shell finished was transferred by the Government to the P contract, accepted, and paid for by the defendant thereunder at the price specified in the P contract.

The "P" Contract (P-19219-4797 A)

See also findings 31, 32, 35

36. Plaintiff on August 15, 1918, and again on August 23, 1918, while it was performing the G contract, made proposals to the War Department seeking another shell contract on the ground that it would not be able to fully amortize its shell equipment and machinery under G contract. The first proposal asked for an amendment to the G contract whereby the Government would take over the installed machinery and reduce the price of the shell to $9 each. The second proposal asked for a new contract for 500,000 shell at $11.50 per shell, on the ground that plaintiff had originally bid on a one-million-shell basis and that the United States had promised the second contract. The representative of the War Department declined both propositions because of lack of proof of any

promise of a second contract, but said that the Department would be willing to offer plaintiff a new contract for 800,000 shell at $9.75 per shell, in view of plaintiff's claim that it had spent $700,000 more than its original estimate. Plaintiff declined these proposals.

37. Under date of September 28, 1918, Lieutenant Colonel Baker of the Ordnance Department wrote the Production Division of the Department's intention to give plaintiff an additional order for 800,000 155-mm. shell, the Government to purchase from plaintiff and take title to all equipment on hand in excess of capacity for machining 5,000 shell per day. He asked to be furnished with information as to the amount of machinery in excess of a capacity of 5,000 per day and its cost, so that negotiations might proceed. Captain Libby of the Production Division made an investigation, and on October 10, 1918, furnished Lieutenant Colonel Sargeant of that division with a list of machinery and equipment showing a cost of $705,182.

38. On October 15, 1918, General Jamieson of the Ordnance Department wrote the Procurement Division, superseding the report of October 10, 1918, attaching a list of equipment and the installation expenses of plaintiff:

> 1. General equipment and installation for 10,000 shell capacity per day, not including machine tools and furnace equipment.
> 2. Machine tools and furnaces in excess of 5,000 capacity per day.
>
> We recommend that the Government purchase one-half the equipment and pay one-half the installation expenses as itemized and purchase all the machine tools and furnace equipment in list No. 2. Total to be expended by the Government $1,482,839.05.[2]

39. October 12, 1918, plaintiff wrote the Procurement Division, attention of Lieutenant Colonel M. G. Baker, as follows:

> 1. Referring to our contract for machining 155-mm. C. S. Shell and to the recoupments of War Credits advance discussed with you, Captain Lafrentz and the

[2] The foregoing letter is a photostatic copy. A carbon copy of a similar dated letter but with some differences, is in evidence as defendant's exhibit 580, and gives the amount as $1,217,990.03.

undersigned, on the first and second instant, I have to state that these recoupments begin after the delivery of 250,000 shell, that some 228,000 have been delivered, that our current production is 25,000 per week, and that we cannot afford the recoupments at this time.

2. We believe that a letter from you confirming your verbal acceptance of our tender to machine an additional 500,000 155-mm. Mark I, common steel shell at a price of $9 each, the United States buying for its account our equipment in excess of that required for 5,000 p. d., will enable the War Credits Board to postpone the recoupments now provided for to a later date, and thus save the present situation.

3. It is understood that you have called upon the Production Division for a report of our present machining capacity and a statement of the equipment in excess of a capacity to machine 5,000 p. d. We further understand that this report is delayed. As our financial case is such that further delay is not possible, the letter indicated above is requested now so that we may take it to the War Credits Board and get such relief as that Board may agree to.

40. In compliance with this request for a letter which could be exhibited to the War Credits Board, Capt. H. S. Garrett, an assistant of Lieutenant Colonel Baker, wrote plaintiff on October 14, 1918, as follows:

Projectile Section.
Attention: Major W. J. Hawkins, Vice President.
International Arms & Fuze Company,
Bloomfield Avenue,
Bloomfield, New Jersey.
Subject: 155-mm. H. E. Shells.

GENTLEMEN:

1. I am directed by the Chief of Ordnance to confirm understanding reached between Lt. Col. Baker of the Procurement Division, Ordnance Department, and Major W. J. Hawkins and Mr. Robert Adamson, which was as follows:

(a) The Department will give you a contract for machining 500,000 155-mm. H. E. shells to be machined in accordance with print 75-4-25, last revised 7/26/18, and specification EA203-0, dated April 27, 1918.

(b) Price $9 each, f. o. b. manufacturer's plant.

(c) The United States Government will furnish forgings, copper bands, base covers, lead discs, and

caulking wire; you are to do all the machine work, heat treat the shell, put on the copper band and press in the base cover, furnish the shipping plug, rope grommet, and pack shells in cars in accordance with specification EA177-0, a copy of which is attached.

(d) During the performance of this contract, at monthly intervals, or upon the termination of this contract prior to its final delivery, the actual cost, up to the time the latent defects hereinafter referred to are discovered, incurred by you in work upon the material or component parts furnished by the United States as hereinafter provided, which during the process of manufacture develop latent defects without any fault on your part, will be determined by the Chief of Ordnance and such actual cost as so determined will be paid by the United States to you. The actual cost herein referred to is defined as comprising the terms of Article 6, subparagraphs (1), (3), and (4), and of the Pamphlet entitled, "Definition of Cost Pertaining to Contracts" issued by the office of the Chief of Ordnance June 27, 1917, and such cost shall be determined in accordance with the terms of the aforesaid Pamphlet which is hereby made a part of this contract by reference. The scrap resulting from the defective material referred to in this paragraph shall remain the property of the United States.

(e) Upon final delivery of the articles herein contracted for, or termination of this contract prior to such final delivery, the actual cost to the United States of any material or component parts other than material or component parts referred to in the preceding paragraph, furnished you by the United States for the performance of this contract, which shall become spoiled or destroyed through faulty workmanship by you, will be determined by the Chief of Ordnance and the total cost of such material or component parts so spoiled or destroyed, if any, shall be charged against you and shall be deducted from any payments thereafter to be made to you or if no such payments remain to be made, you shall pay immediately to the United States the actual cost of such material or component parts so spoiled or destroyed as above determined by the Chief of Ordnance. Upon reimbursement to the United States by you of the cost of the materials referred to in this paragraph, the scrap resulting from the spoilage or destruction of such materials shall become the property of you.

(f) All other scrap resulting from the manufacture of these shells, except as herein mentioned, shall become your property.

(g) It was also understood and agreed that the Government would pay for and take title to all the machinery you have installed in addition to what it requires to machine 5,000 shells per day. In addition to this, it is understood that the Government will also pay for the installation of the machinery to which it takes title.

(h) Deliveries of these shells are to be as follows:

December 1918	125,000
January 1919	150,000
February	150,000
March	75,000

2. The Production Division will compile figures in order to show the amount of money which the machinery above referred to will cost the Government. Just as soon as the Production Division has accomplished this work, this Section will put through an order in accordance with the above understanding. The above, however, is subject to the approval of the proper authorities.

41. Plaintiff with the foregoing letter of October 14, 1918, negotiated the third supplemental agreement (see finding 20) of the G contract on October 17th, and postponed the recoupment by the Government as therein provided.

42. Plaintiff, on November 29, 1918, in a letter to the Ordnance District Chief, New York, gave its view of the history of the G and proposed P contracts, expressed its feeling that the proposed P contract should be formally executed, and said, concerning the P contract:

This contract was negotiated by and with the advice and consent of Captain LaFrentz of the War Credits Board and was later passed by the War Industries Board and was written up in the Legal Section of the Procurement Division.

About this time a deficit occurred in the funds of the Ordnance Department and a considerable delay occurred in the final execution of this contract. After the deficit was eliminated the contract was just about to be signed when the armistice was signed and a stop order was placed on all unissued contracts.

We are now therefore in the same position as a company would have been which received an order for the machining of 500,000 shell, the Government purchasing facilities which had proceeded to the point of building its factory, purchasing and installing the machinery

when the Government stopped the issuance of the contract and the company not reimbursed for any of its expenditures.

43. Under date of December 11, 1918, Major C. S. Reed, District Procurement Office, wrote the Projectile Section Procurement Division, the following letter:

> 1. Referring to letter of October 14th from your Section over the signature of Lieut. Col. Merrill G. Baker by Captain H. S. Garrett; addressed to International Arms & Fuze Co., Bloomfield, N. J., advising them of a proposed contract to be awarded them for machining 500,000 155-mm. H. E. Shell, referring to subparagraph "g," it would seem that the obligation of the United States is recognized to this contractor for taking title to and making payment for all machinery installed by the contractor in addition to what is required for machining 5,000 shells per day.
>
> 2. If this is true, inasmuch as the contractor has machinery now installed, it would seem necessary in order to give him protection, to put through the contract as proposed and suspend it immediately upon issuance. In this way the District Claims Board can take action on the contractor's claim.

44. On or about January 31, 1919, plaintiff and the defendant signed a formal contract, known as P-19219-4797-A, dated November 5, 1918, for the machining of 500,000 155-mm. shell, said contract being in evidence as plaintiff's exhibit "B," and made part hereof by reference. It provided for the machining, heat treatment and banding of 500,000 155-mm. Mark I, high explosive shell from forgings to be supplied by the United States, according to Ordnance Drawing 75-4-25, last revised July 26, 1918, and with Ordnance Office Specifications for machining and finishing U. S. Common Steel numbered EA 203-0 dated April 27, 1918, said specifications being made part of the contract as if set out in full. Deliveries of machined shell to the United States were to be made as follows, beginning December 1, 1918:

During December 1918	125,000
During January 1919	150,000
During February 1919	150,000
During March 1919	75,000

The contract provided, in part:

ARTICLE III. *Price and payment.*—As a just and fair compensation, the United States will pay to the Contractor the sum of nine dollars (9) for each article as and when the same is delivered to and accepted by the United States, upon proper certificate of the inspecting and receiving officer, and in addition thereto, the United States shall, with all convenient speed, purchase from the Contractor all machinery, tools, and equipment found by the Chief of Ordnance to be in good condition, suitable for the manufacture of 155-mm. shells and to have been installed at the Contractor's said plant in excess of the amount of machinery, tools, and equipment found by the Chief of Ordnance to be necessary to machine 5,000 shells per day of 24 hours. To the actual cost of such said excesss machinery, tools, and equipment as are in good condition and suitable for the manufacture of 155-mm. shell, there shall be added the actual cost of installing the same, all as determined by the Chief of Ordnance, and from the aggregate of said costs there shall be deducted 10% of the said actual cost of excess machinery, tools, and equipment (exclusive of said actual cost of installation) on account of depreciation. The resulting amount shall be paid to the Contractor in full for said excess machinery, tools, and equipment, and the installation thereof; provided that the amount so payable shall in no event exceed the sum of $978,000.

The Chief of Ordnance may determine what particular items of the machinery, tools, and equipment at said plant shall be considered as excess machinery, tools, and equipment.

ARTICLE IV. * * * The United States shall remove all of said excess machinery, tools, and equipment within one year after the termination of this contract, except that after the expiration of said period the United States may require the Contractor to store the same at the expense of the United States. * * *.

45. Under date of March 10, 1919, Major R. H. Hawkins (not W. J. Hawkins, plaintiff's vice president), of the contract section, Ordnance Department, wrote to New York District Claims Board, 1107 Broadway, New York, as follows:

Subject: Form of Contract War-Ord. P19219–4797A—International Arms and Fuze Company.

1. Conforming with the provisions of Supply Circular No. 17, Purchase, Storage & Traffic, and the Ordnance

Claims Board Circular No. 56, there is forwarded herewith one typewritten copy of the Form of Contract that would have been issued to the Contractor under the above War-Ord. Number. This is to be used in the preparation of the Contractor's claim under the provisions of the Act of March 2, 1919, and the Circulars above referred to.

2. The contract was carefully prepared after several days' conference between Lt. Colonel William Williams and Lt. Merrill G. Baker for the Government, and Messrs. Dwight Adamson and Hawkins (the latter is no kith or kin to the writer). The contract was executed but not delivered or released. The executed copies were placed in the safe in this office with the following notation:

"Contract with International Arms and Fuze Company not to be mailed until necessary Legislation is passed—By order of Colonel Lamont."

This was under date of January 31, 1919.

3. The sole purpose of executing the contract was to make the agreement contain the final word of the negotiations which has lasted over several months.

4. Work upon the contract was suspended by notice forwarded through your office, and it is understood that the claim is now in process of settlement in your office.

The contract in evidence fails to show the notation quoted in the above letter.

The evidence does not show that the contract as executed on behalf of the United States was ever delivered to plaintiff.

46. The Chief of Ordnance, by and with the consent and under the authority of the Secretary of War, created various boards throughout the United States, known as Ordnance District Claims boards, for the purpose of hearing claims of, and entering into tentative agreements with the various contractors of the Ordnance Department on account of claims presented by them growing out of the suspension or cancellation of ordnance contracts or orders. The jurisdiction of these boards and the limitation upon their absolute authority to obligate or bind the United States are set out in the following:

For the handling of this subject in the Ordnance Department, there has been created by office order no. 381—dated November 5, 1918—a claims board. The claims board will direct from time to time the suspensions or

alterations of contract in accordance with the provisions therein contained.

* * * * *

The claims board will have general control of the adjustment, settlement, and payment of claims of contractors arising from suspension, discontinuance, or curtailment orders, and such other claims as may be within the powers of the Chief of Ordnance to determine.

* * * * *

The ordnance claims board at Washington will recognize the original action with contractor and it will be necessary for all negotiations for a settlement with a contractor to be started with the district board and will be followed up to a final conclusion by the district board, and when final agreement has been reached and all necessary papers duly signed and delivered, they will then be forwarded to the claims board in Washington for its final approval. * * *

November 26, 1918, there was issued, promulgated, and published by and under the authority of the Chief of Ordnance, by W. S. Pierce, Brigadier General, Ordnance Department, chairman of the ordnance claims board, Ordnance Claims Board Circular No. 2, Revised, providing as follows:

District claims boards shall have jurisdiction over:

(a) The negotiations, settlement, and payment of claims of contractors arising out of the suspension of operations under, or the cancellation or curtailment of ordnance contracts or orders.

(b) All other claims arising out of the performance of contracts or otherwise, which have not been adjusted prior to cancellation or completion, and which are within the powers of the Chief of Ordnance to determine: *Provided, however*, That every award or settlement of a district claims board shall be submitted for approval to the claims board of the Ordnance Department. * * *

47. Plaintiff at the time of the Armistice, was engaged in the performance of various munitions contracts for the Government, other than the shell contracts, all of which were then or had been theretofore suspended.

The District Ordnance Claims Board of New York, which had jurisdiction of plaintiff's claims, forwarded to plaintiff detailed instructions for the preparation of its claims

against the Government arising out of its suspended contracts.

48. The Dent Act was approved on or about March 2, 1919, subsequent to the filing of plaintiff's claim on the P contract with the District Claims Board, and authorized the Secretary of War to award compensation for expenditures connected with prosecution of the war, when made upon the faith of an agreement, express or implied, entered into with an officer or agent acting under authority of the Secretary of War or the President, when such agreement was not executed in the manner provided by law.

March 18, 1919, the District Claims Board, Ordnance Department sent plaintiff instructions and forms for use in order that its informal contract with the Government might be acted upon.

49. A copy of the statement of claims, form A, filed for the P contract, under the Dent Act, by plaintiff and signed by W. J. Hawkins, plaintiff's vice president, dated March 21, 1919, contained, among others, the following statements:

* * * * *

> 2. That the agreement was entered into in good faith for purposes connected with the prosecution of the war, and the claimant had performed the said agreement in whole or in part, or had made expenditures or incurred obligations upon the faith thereof, prior to November 12, 1918.
>
> The facilities referred to in contract P 19219–4797A had been purchased and installed before November 12, 1918; and before suspension on contracts (December 17, 1918) contractor delivered 11,158 155-mm. common steel shell under this contract for which delivered shell the contractor has received payment on March 1919.
>
> * * * * *
>
> 4. That hereto attached is an attested copy or copies of the best written evidence within the claimant's control of the nature, terms, and conditions of the said agreement in the form of an unsigned contract dated November 5th, 1918, and a letter from the Procurement Division dated October 14th, 1918, stating that contract for machining 500,000 155-mm. H. E. Shell, will be awarded to this Company. Both copies attached hereto.
>
> 5. That the said agreement has not been executed in the manner prescribed by law.

50. Plaintiff prepared and filed with the District Claims Board under the P contract a claim in the amount of $1,187,747.70. The claim was audited, considered, and finally paid to plaintiff by the Government in the amount of $912,614.81, itemized as follows:

Unworked direct materials	$8, 183. 41
Indirect materials	569, 186. 34
Commitment for materials and service	37, 785. 80
Claims for other compensation	340, 051. 68
	955, 207. 23
Less item paid in G contract	42, 592. 42
	912, 614. 81

Plaintiff also received from the defendant under the P contract:

For 11,158 shells at $9 each	$100, 422. 00
Machinery and equipment taken over by the Government	977, 998. 93
	1, 078, 420. 93

51. Plaintiff in May 1919 filed its claim under the G contract as follows:

Expenditures for heat treating	$594, 904. 59
Expenditures for hard forgings	1, 039, 360. 78
Expenditures incurred on account of acts of the U. S. beyond control of contractor	483, 775. 96
Total of Contractor's Claim	2, 118, 041. 33

The award as finally made on the G contract was as follows:

Heat-treating expenses	$379, 972. 50
Cost of buildings and equipment for heat treating	93, 726. 55
Annealing hard forgings	178, 906. 87
Extra cost of machining hard forgings	480, 488. 05
Expenses caused by delays by acts of the United States	333, 875. 72
Total	1, 466, 969. 69
Less material unaccounted for	39, 519. 88
Net total paid to plaintiff on award under G contract	1, 427, 449. 81

In connection with the G contract, plaintiff was paid by the Government:

For 500,000 forgings at $11.50 each	$5, 750, 000. 00
For machinery	673, 815. 41
On the Claims Board award	1, 427, 449. 81
Total received under the G contract	7, 851, 265. 22

52. Plaintiff's plant did not have normal operating capacity for sustained production of 10,000 shell per day, with the type of forgings that it was furnished by the Government. Plaintiff's plant did produce 10,000 shell per day for two or three days, but the operation nearly wrecked the plant. The evidence does not show what plaintiff's daily plant capacity would have been if the forgings had been of the quality which plaintiff claims the specifications called for.

53. The defendant, before it made the awards mentioned in findings 50 and 51, had made investigations at plaintiff's plant, both prior and subsequent to the Armistice, with its engineers, accountants, and other representatives, covering plaintiff's buildings and the machinery and equipment throughout the plant; had compiled inventories of the machinery and audited its cost; and had prepared a list of equipment and its cost. These investigations were detailed, complete, and covered a considerable length of time. The defendant had full knowledge of plaintiff's plant, machinery, equipment, and tools, and audited their costs.

Plaintiff contends that it expended, in connection with the two shell contracts, $12,123,393.62; that it received from all sources, including payments for shell completed, for salvage or disposal of entire shell plant and from the awards on the claims, $10,888,766.89. The difference, which is the amount which the plaintiff claims in this suit, is $1,234,626.73.

The defendant contends that plaintiff's actual shell expenditures were $10,697,371.16; and that plaintiff has received more than it spent on shell in the sum of $191,395.73.

54. In this suit, plaintiff's auditors first presented an audit showing all the expenditures which they claimed were properly attributable to the shell contracts and the credits to which the Government was entitled. This audit was

made from the company's records and from other information which the auditors obtained. The Government's auditors then took this audit and reexamined the data upon which it was based, approving or "allowing" such charges as, in their view, were proper, and disapproving, or "disallowing" the others. The allowance or disallowance of charges affected the net results of the audit in other ways. For example, if the cost of a certain machine, charged by plaintiff's auditors to the shell contracts, was disallowed by the Government's auditors, then a credit given by plaintiff's auditors to the Government for the price for which plaintiff sold that machine, would likewise be disallowed, or rejected, and the net reduction of the plaintiff's claim would be, not the whole amount of the charge, but only the amount by which the charge exceeded the credit. In the matter of interest charges, if the Government's auditors disallowed an item of expense such as the cost of a machine or the salary of an executive, and plaintiff had paid the cost or the salary with borrowed money, the disallowance of the item would necessarily result in a disallowance of the interest paid for the money borrowed for that purpose.

As stated in finding 53, the net expenditures for shell shown by plaintiff's auditors were $12,123,393.62 and the excess of this sum over the receipts from the Government in payments on the contracts and on the settlement awards was $1,234,626.73, which difference plaintiff claims in this suit. The Government auditors originally disallowed a net amount of $1,522,102.54, or more than the deficit which plaintiff claimed, the Government thus asserting that there had already been an overpayment. On the trial of the case, each side conceded certain errors in its audit.

The items of expense as to which the auditors were in disagreement before the trial are shown in the following table. Columns 5 and 6, and the footnotes to the figures in column 4, show the court's findings as to whether, and in what amount, the listed items claimed by the plaintiff and disputed by the defendant were proper charges to the shell contracts here under consideration, or, in a few instances, proper shell credits. As to some of the listed items, more detailed and separately numbered findings follow the tabulation.

1	2	3	4	5	6
Item No.	Description	Amount claimed by plaintiff as shell expense	Amount of credit given defendant by plaintiff	Amount of plaintiff's claim allowed by court	Amount of plaintiff's claim disallowed, or defendant's credit allowed, by court
1	First Ideal Down Draft Boiler	$471.32		$471.32	
2	Second Ideal Down Draft Boiler	461.21		461.21	
3	Six Brown & Sharpe Screw Machines	8,270.00			$8,270.00
4	Six Monarch 14″ x 6′ Lathes	3,810.00			3,810.00
5	Two Monarch 14″ x 6′ Lathes	1,579.50		1,170.00	409.50
6	Credits for Sales of Eight Monarch 14″ x 6′ Lathes		[1] $3,530.00		
7	Two Monarch 18″ x 10′ Loose Change Lathes	1,850.00			1,850.00
7	Sale of Two Monarch 18″ x 10″ Loose Change Lathes		[2] 2,015.00		
8	Riehle Presses [3]				
9	One 1-ton Duplex Chain Hoist, 20′ lift	45.91		33.00	12.91
10	Three pieces Chain for Duplex Blocks	53.46		39.60	13.86
11	One 8″ 3-Jaw Universal No. 306 Skinner Chuck	44.50			44.50
12	Three #2 Jacobs Chucks and Wrenches	22.27			22.27
13	Two Spring Collet Chucks	8.50			8.50
14	One set of Johannson Gauges	465.12		465.12	
15	One Set Miscellaneous Gauges	501.24			501.24
16	One Weston AC-DC Voltmeter	73.74		73.74	
17	Thirty Spring Collets, Assorted Sizes	111.50		90.00	21.50
18	One each Nos. 1, 2, 3, 4 Morse Twist Drill Taper Collets	25.27		18.72	6.55
19	One No. 8 Blount Bench Grinder	12.82		9.50	3.32
20	One Heald Grinder	2,865.71			2,865.71
21	One Wilmarth and Morman Surface Grinder	1,485.33		1,100.00	385.33
22	One Wilmarth and Morman Universal Grinder	1,485.00		1,100.00	385.00
23	One ¾″ P. G. Condulet	1.25		1.25	
24	One G.E. 2 H.P. 3-phase 250 V. Snap Switch	2.50		2.50	
25	Three Shaper Keyway Cutting Tool Holders and Six Bases	12.00		12.00	
26, 27, 28	Ten Pairs Parallel Strips of Various Sizes	38.57		38.57	
29	Four Champion Lathes	1,810.00		1,600.00	210.00
30	Three Dalton Lathes	1,120.00		1,120.00	
31	One No. 4 Elgin Bench Lathe	365.00			365.00
31	Duty and Tax on One No. 4 Elgin Bench Lathe	127.74			127.74
32	One Mulliner Lathe	1,250.00		1,250.00	
33	One Brown & Sharpe Universal Milling Machine Vise	30.00			30.00
34	Two Brown & Sharpe Universal Milling Arbors #44—⅞″ Nut	40.00			40.00
35	Two Brown & Sharpe Universal Milling Arbors #47—1½″ Nut	40.00			40.00
36	One Brown & Sharpe Universal 10″ Circular Milling Attachment	158.00			158.00
37	One U. S. Machine Tool Co. Milling Machine	337.84			337.84
38	Three 25 H. P. Fairbanks-Morse Motors	2,501.70		1,984.20	517.50
39	One ¼ H. P. Fidelity Motor	32.23		23.80	8.43
40	One ¾ H. P. Wagner A. C. Motor	62.40		46.10	16.30
41	Two 5 H. P. Westinghouse Motors	367.20		270.00	97.20
42	One Champion Drill Press	135.00		135.00	
43	One 16″ Barker Shaper	708.75			708.75
44	One 16″ Ohio Shaper	810.00			810.00

[1] The court approves $850 of this credit and reverses $2,680.
[2] This credit is reversed by the court.
[3] Plaintiff's claim as to this item was withdrawn.

Reporter's Statement of the Case

1	2	3	4	5	6
Item No.	Description	Amount claimed by plaintiff as shell expense	Amount of credit given defendant by plaintiff	Amount of plaintiff's claim allowed by court	Amount of plaintiff's claim disallowed, or defendant's credit allowed, by court
45	One #2 Smith Mills Shaper	$725.00		$725.00	
46	Forty Barrett Transveyor Trucks	3,987.50		2,900.00	$1,087.50
47	Eighteen Cowan Transveyor Trucks	3,031.88			3,031.88
48	856 Truck Wood Skids	1,070.00		1,070.00	
49	Thirty-four Bench Vises	416.10		389.84	26.26
50	Duty and Tax [4]				
51	Depreciation claimed by Government [5]				
52	One 14 E. Seneca Falls Lathe	776.25			776.25
53	One #1 Fairbanks Lathe	222.75			222.75
54	One #2 Fairbanks Lathe	222.75			222.75
55	One Dalton Lathe	334.80		248.00	86.80
56	One Elgin Lathe	492.75			492.75
57	One 14 E. Van Wyack Lathe	550.00			550.00
58	One Buisse Grinder	1,012.50			1,012.50
59	One of Three U. S. Kempsmith Milling Machines	6,831.00		3,373.33	3,457.66
60	Two Fairbanks-Morse 25 H. P. Motors	1,464.38		1,065.00	399.38
61	One Gas Engine and Generator Set	6,605.60			6,605.60
62	One Heald Machine Magnetic Chuck	148.50			148.50
63	One 4″ 3-Jaw Winton Universal Chuck	47.25			47.25
64	One Electric Tool Co. Portable Drill	110.10		110.10	
65	One Electric Tool Co. Tool and Center Grinder	62.10		62.10	
66	Hospital Equipment	1,558.73		1,558.73	
67	Sales of Machinery and Equipment [6]		$14,421.82		
68	One #3 Diaphragm Pump	26.00		26.00	
69	One 70 H. P. De La Vergne Engine	3,750.00		3,750.00	
70	Two Spray Nozzles for De La Vergne Engines	17.08		17.08	
71	One 1″ Gould Centrifugal Pump	20.00		20.00	
72	One Straight Face Steel Pulley	4.78		4.78	
73	Eight Type K Dodge Hangers	95.68			95.68
74	Services of Gilbert and Barker	24.30		24.30	
75	Labor on Furnaces	140.60			140.60
76	Labor on Boilers	44.45		44.45	
77	Labor and Material—Power Plant	193.51		193.51	
78	One 6″ Air Chuck and Cylinder	120.00		120.00	
79	Four 6″ Air Chucks and Cylinders	480.00		480.00	
80	Six 6″ Air Chucks and Cylinders	720.00		720.00	
81	Twenty 6″ Air Chucks and Cylinders	2,400.00		2,400.00	
82	Six prs. Machine Steel Blank Step Jaws 6″ Chucks	18.00		18.00	
83	Six 3 W Robervahl Scales	72.00			72.00
84	Six 24″ Fire Ends (pyrometers)	21.00		21.00	
85	Six 36″ Fire Ends (pyrometers)	21.00		21.00	
86	One Crocker-Wheeler Alternator	750.00			750.00
87	Three 10 x 5 Pratt & Whitney Toolmakers Lathes	4,875.00		4,875.00	
88	One W. & S. Automatic Chuck and Ratchet Bar	500.25		500.25	
89	Two 1″ Mueller Steam Pressure Regulators	34.60			34.60
90	Four 1″ Mueller Steam Pressure Regulators	80.00			80.00
91	One 2″ Mueller Pressure Reducing Valve	39.30			39.30

[4] The duty and tax has been disallowed in connection with the particular items on which it was paid.

[5] The Government's claim of a credit is disallowed and therefore does not affect the result.

[6] This credit will have to be recomputed to adjust it to the disposition made of the claims for the items sold.

1	2	3	4	5	6
Item No.	Description	Amount claimed by plaintiff as shell expense	Amount of credit given defendant by plaintiff	Amount of plaintiff's claim allowed by court	Amount of plaintiff's claim disallowed, or defendant's credit allowed, by court
92	Four 6″ I. C. B. Pressure Gauges	$29.12			$29.12
93	Two 6″ Steam Gauges	15.60			15.60
94	Six 5″ Steam Gauges	21.00			21.00
95	Nine Steam Gauges	31.50			31.50
96	Two Steam Gauges	7.00			7.00
97	Six Steam Gauges	21.00			21.00
98	One 8 x 14 x 18 Steam Heating Vacuum pump	592.00			592.00
99	One Monorail Crane	185.95		$185.95	
100	Two H. & M. Thread Millers	2,590.00			2,590.00
101	Castings No. 674, 675 and 692	1,025.30			1,025.30
102	R. Godden—Traveling Expenses	320.85			320.85
103	Fire Clay, Cement, etc	108.95			108.95
104	One Dudgeon Roller Tube Expander	22.00		22.00	
105	One Bronze Rotary Force Pump	131.63			131.63
106	One 5″ Pennie Back Water Trap	9.35		9.35	
107	Drains and Tiles	27.60			27.60
108	Moving Transformers	50.00		25.00	25.00
109	Moving Transformers	75.00		37.50	37.50
110	Moving Transformers	50.00		25.00	25.00
111	Flanging Overlap on 20″ Pipe	37.35		37.35	
112	One I. B. Expansion Joint. Standard Transverse	6.88		6.88	
113	Four 200 Amp. four pole Oil Switches	354.20		354.20	
114	One Fan for Blower	24.18		24.18	
115	Twenty-four Six Pin 6″ Cross Arms	22.92		22.92	
116	Fifty Shot Gun Shells for Gas Engine	8.12			8.12
117	Grinding 45 Saws	54.00			54.00
118	Sales Credits for Miscl. Machinery [6]		$1,169.56		
119	Castings, 920–926	212.38			212.38
120	130 Roller Bearings 2 3/16″	889.20		889.20	
121	Three 2 15/16″ x 1 7/16″ x 6½″ Bushings	7.91			7.91
122	Ten Pulleys	71.61		71.61	
123	48 Bearings	620.73			620.73
124	Shafting	26.21			26.21
125	Couplings	456.00		261.60	194.40
126	One #2 Thread Miller	665.00			665.00
127	Two Pieces 14″ x ⅜″ O. D. Pipe	81.50		81.50	
128	Credits claimed by Defendant [7]				
129	Credit claimed by Defendant on Account of Salvage Value of Kelly-Springfield Truck				1,200.00
130A	Credit claimed by Defendant on Voucher #48,878				16.94
130B	Credit reversed by Defendant for bill #12,758		[8] 200.20		
131	Material taken by the United States in Settlement of P Contract—overpayment claimed by Government				20,617.01
132	Power, Heat and Light (see also finding 56)	220,309.08		191,938.92	28,370.16
133	Employers' Liability Insurance (see also finding 59)	48,602.66		20,192.90	28,409.76
134	Advanced Expenses	1,191.22		994.22	197.00
135	American Federation of Labor	50.00		50.00	
136	Hauling (Grimshaw's Express)	168.50		168.50	
137	Stationery and Printing	683.13		683.13	
138	Repairs Boilers	207.20		36.19	171.0[illegible]
139	Chemical Laboratory Supplies	504.26		504.26	
140	Cleats for 350,000 CM Wire	75.15		23.40	51.75

[6] This credit will have to be recomputed to adjust it to the disposition made of the claims for the items sold.

[7] This item is to be rechecked by the auditors of the parties.

[8] This credit is approved by the court.

1	2	3	4	5	6
Item No.	Description	Amount claimed by plaintiff as shell expense	Amount of credit given defendant by plaintiff	Amount of plaintiff's claim allowed by court	Amount of plaintiff's claim disallowed, or defendant's credit allowed, by court
141	First Aid Supplies	$96.93		$896.93	
142	Addressograph Plates	33.75		33.75	
143	Women's Uniforms	360.00		360.00	
144	Accrued Pay roll (unused Pay roll)		[8] 86,113.41		
145	Taxes—Real and Personal	18,564.57		13,410.46	$5,154.11
146, 147	Coal Inventory Adjustment (see also finding 57)	11,643.09			11,643.09 9,246.57
148	Storage of Government Material		[9] 13,750.92		
149	Officers' Salaries—Harriss and Patterson (see also finding 58)	204,535.74		20,800.00	183,735.74
150	Officers' Salary—W. J. Hawkins (see also finding 58)	50,383.39		5,200.00	45,183.39
151	Fire Insurance Premiums (see also finding 59)	270,729.21			270,729.21
152	Freight on Machinery	385.09			385.09
153	Salary—John Brooks	2,260.29			2,260.29
154	Reimbursement to W. J. Hawkins (see also finding 61)	66,233.72			66,233.72
155	Payment to Leo McCabe	387.48			387.48
156	Reimbursement—J. N. Watson	4,942.93			4,942.93
157	Life Insurance Premium—W. J. Hawkins (see also finding 62)	20,578.10		14,929.79	5,648.31
158	Cash Disbursement	129.16			129.16
159	Taxes—Pompton Lakes	298.30			298.30
160	Salaries, Miscellaneous	161.45			161.45
161	Rents	271.24			271.24
162	Capital Stock Tax	388.12			388.12
163	Personal Tax—City of New York	56.41			56.41
164	Maine Franchise Tax	102.24			102.24
165	Loss on Liberty Bonds	24,754.85			24,754.85
166	Miscellaneous General Overhead	1,596.50			1,596.50
167	Miscellaneous Salaries	10,101.49			10,101.49
168	Payment to J. W. Brook	968.70			968.70
169	Legal Services	3,377.58			3,377.58
170	Miscellaneous	5,032.82			5,032.82
171	Commission (see also finding 60)	172,500.00			172,500.00
172	Interest [10] (see also finding 63)	93,577.26			
173	Overpayment by United States on Other Contracts [11]				
174	Unabsorbed Overhead (see also finding 64)	133,492.52			133,492.52
174A	Adjustment of Accounts Payable (see also finding 64)	47,746.69			47,746.69
174B	Adjustment of Accounts Receivable (see also finding 64)	4,653.47			4,653.47
174C	Commission on Metal Purchases (see also finding 64)	20,150.00			20,150.00
174D	Miscellaneous Expenditures (net) (see also finding 64)	10,675.03			10,675.03
174E	Unabsorbed Overhead to 11/1/19 (see also finding 64)	14,516.17			14,516.17
174E	Unabsorbed Overhead after 10/31/19 (see also finding 64)	57,238.97			57,238.97
174F	Adjustment Applicable to Primers (see also finding 64)		[12] 9,056.26		
175	Salaries and Expenses—Crow Hill	6,769.16			6,769.16
	Total	1,618,045.73	50,257.17	307,729.79	1,247,819.19

[8] This credit is approved by the court.
[9] The court approves $2,859.32 of this credit and reverses $10,891.60.
[10] This item is reserved for reaudit on the basis set forth in the findings and opinion.
[11] The defendant's claim of a credit under this item has been withdrawn.
[12] This credit is reversed by the court.

55. *Items 5 and 9 to 66 inclusive. Machinery and equipment obtained from Internationl Manufacturing Company, Ltd.*—International Manufacturing Company, Ltd., a Canadian corporation, was a wholly owned subsidiary of plaintiff. Its plant was at Montreal. It had a munitions contract with the British Government, and plaintiff purchased in the United States and sent to Montreal the machinery needed to perform that contract. International paid to Canada, as duty and tax, 35% of the cost of the item sent. When the British contract was completed, the Montreal plant was closed, and plaintiff caused the machines to be returned or sent to its Bloomfield, New Jersey, plant for use in performing plaintiff's munitions contracts with the United States Government. The machines had been used in Canada for from eight months to a year. Plaintiff entered the transaction on its books as a sale from International to plaintiff, the price being the cost of the machines to International plus the 35% duty and tax. In the United States some machines were hard to get, or to get promptly, and prices were high for both new and used machines. Plaintiff paid the freight for the return of these machines from Canada, and there is no dispute about that charge. The original cost of the machines is allowed as a proper shell charge. The 35% addition for duty and tax is disallowed.

56. *Item 132. Power, Heat, and Light.*—We find that the apportionment of the cost of power, heat, and light to the shell contracts in proportion to the cost of direct labor used on those contracts is the most accurate available method of determining this item of shell expense. It is the method used by plaintiff in keeping its own accounts. The method proposed by plaintiff, of subtracting the average costs, for five months preceding the shell operations, from the total, and attributing the remainder to shell, fails to take account of the fact that operations under the other contracts also increased substantially during the shell-performance period.

57. *Items 146, 147. Coal Inventory Adjustment.*—Plaintiff had on hand, when its shell operations had closed, coal which had cost it, including freight, $50,660.00. Because the price of coal had gone down, it was worth only

$32,631.00, a difference of $18,029. It includes this asserted loss as general overhead, and apportions $11,643.09 of it to shell. But plaintiff has, in the settlement of other contracts, already been paid $15,234.51 on account of this asserted loss. Further, the freight costs on the coal, which amounted to $16,613.50, were treated on plaintiff's books as current operating costs, hence plaintiff has been in the settlement of the other contracts and will be in this accounting, allowed the full amount of the freight. The asserted loss of $11,643.09 will be disallowed, and a further disallowance of $9,246.57, the shell proportion of the overpayment which would result if the freight costs were paid in full as overhead, will be made.

58. *Items 149 and 150. Salaries of Harriss, Patterson, and Hawkins.*—Dr. John A. Harriss and Mr. Rufus L. Patterson were, during the period of the shell contracts, president and treasurer of plaintiff, respectively. In September 1917, before the shell contracts were made, Harriss and Patterson each owned approximately two-fifths of plaintiff's stock. Hoyt and Company owned approximately one-fifth, and W. J. Hawkins, plaintiff's vice president and manger of its plant, about one-sixtieth. About the first of December 1917, when the G shell contract was being closed, Hoyt and Company disposed of its stock to Harriss and Patterson in equal amounts. The evidence does not show just when this took place, but we have concluded from the fact that Hoyt canceled his insurance policy hereinafter discussed in finding 59, on November 26, and that the formal transfer of his stock on the books of the Company was made in December and the following February, that he withdrew from the company about December 1. The corporate organization was somewhat changed in March 1918, a larger interest was given to Hawkins, and thereafter Harriss and Patterson each owned twelve twenty-fifths and Hawkins one twenty-fifth of the stock.

The salaries of Harriss, Patterson, and Hawkins as president, treasurer, and vice president of plaintiff were set at $100,000 a year each. Plaintiff had one customer, the United States Government, and one plant, at Bloomfield, New Jersey. Harriss and Patterson lived and had their offices in

New York. Each had many other properties and many other interests besides the affairs of plaintiff. They conferred with each other and with Hawkins about plaintiff's problems, and did what devolved upon them as officials of plaintiff. Harriss looked after some secret service organization in connection with plaintiff's plant. Both endorsed plaintiff's notes given for advances made by the Government on the shell contracts, and each charged plaintiff a 5% commission for so doing. In finding 60 we discuss these commissions as shell charges. We have compared what Harriss and Patterson did for plaintiff with what Hawkins did, and have concluded that a salary for each of $20,000 a year would have been fair and reasonable, and a proper proportion of those salaries treated as general overhead and allocated to the shell contracts for the period of performance of those contracts, February 1, 1918, to January 31, 1919, is a reimbursable shell expense.

W. J. Hawkins was, in 1915, a major in the U. S. Army Ordnance Department. In that year he resigned his commission and was employed by plaintiff under a contract, the pertinent provisions of which read as follows:

> 1. That the party of the first part will and does hereby employ the party of the second part in the capacity of Ordnance Engineer, for the term of five (5) years beginning on the 1st day of November 1915, and ending on the 1st day of November 1920, at an annual salary of Ten Thousand ($10,000.00) Dollars.
>
> 2. That the said annual salary shall be paid by the party of the first part to the party of the second part in twelve equal installments, each installment being payable on the last day of each and every month during the said period of five years, unless the employment of said party of the second part shall be sooner terminated for cause or by death.
>
> 3. That the party of the second part hereby accepts and does enter into the employment of the party of the first part as aforesaid, and hereby covenants and agrees with the party of the first part that during the term of this contract he will devote the whole of his time, attention, and energies to the performance of such acts and duties as may be specified and required by the party of the first part from time to time, and will not either directly or indirectly, alone or in partnership, be

connected with or concerned in any other business or employment whatsoever; and the said party of the second part further covenants and agrees that during the term of this contract he will in all respects conform to and comply with the regulations given and made by the party of the first part, and will serve the said party of the first part faithfully, diligently, and according to his best abilities in all respects, and will use his utmost endeavors to promote the interests of the said party of the first part.

4. That the legitimate and reasonable expenses of the said party of the second part, incurred in connection with the business of the Company during the term of this contract, and approved by the Board of Directors, shall be paid by the party of the first part.

5. That in addition to the annual compensation herein agreed to be paid to the party of the second part, for the services to be rendered by him, the party of the first part will pay to the party of the second part upon the execution and delivery of this contract of employment, a bonus of Fifty Thousand ($50,000.00) Dollars, in cash.

Under the contract plaintiff paid Hawkins $50,000 in cash as a bonus upon the signing of the contract. His yearly salary fixed by the contract was $10,000, to run for five years, and $50,000 was placed in escrow to secure the payment of his salary for the five years, to be paid to him in monthly installments over the five-year period.

In December 1917, about the time the G shell contract was obtained, Hawkins' salary was increased to $100,000 per year, and he drew this salary for 1918 and 1919, or the total of $200,000 for the two years. The $100,000 salary included the installments from the escrow fund, which amounted to $833.33 per month, while the balance was paid from the general funds of the company.

Hawkins was the active manager of plaintiff's plant and business. His salary of $100,000 a year was set by Harriss and Patterson, who owned and controlled that business. The fact that they set his salary at that figure is evidence that the salary was reasonable, and from that and other evidence we find that it was, and that a proper proportion of it, for the period February 1, 1918, to January 31, 1919, is a proper shell expense. No part of the $50,000 bonus which was paid Hawkins in 1915 is a proper shell charge.

59. *Item 133. Employers' Liability Insurance Premiums. Item 151. Fire Insurance Premiums.*—Prior to July 9, 1918, plaintiff had carried its liability insurance in commercial companies and paid premiums to those companies at regular rates. In June 1918 plaintiff applied to the appropriate department of the State of New Jersey for permission to pay workmen's compensation to its employees without insurance, and asked to be advised of any regulations relating to reinsurance by two or three stockholders who desired to so reinsure this liability. The Department of Banking and Insurance replied that the law provided that a company might reinsure but that the Department had nothing to do with a contract of reinsurance. July 3, 1918, an exemption was granted plaintiff by the Commissioner of Banking and Insurance permitting it to pay workmen's compensation without carrying insurance therefor.

Accounts were opened on plaintiff's books, crediting to Harriss, Patterson, and Hawkins, on a basis in proportion to their ownership of plaintiff's stock (see finding 58) the amount which plaintiff would have had to pay to an insurance company for employers' liability insurance. The evidence does not show that the three stockholders wrote any policies or other contracts of employers' liability insurance. From July to December 1918, the period of this arrangement, when plaintiff paid compensation to an employee, the amount of it was charged to the three stockholders in proportion to their holdings. Beginning January 1, 1919, these charges were no longer made, even for payments made for injuries which occurred in 1918. In preparing the present claim, those amounts have been deducted from the surplus left in the stockholders' hands after the charges made in 1918 were deducted. On the portions of the payments charged to shell, and after the correction just mentioned, the stockholders were paid $28,409.76 more than plaintiff paid to injured workmen. We find that this amount is not a proper shell charge. It was not insurance but an arrangement whereby the owners of plaintiff saved the cost of insurance for the purpose of dividing the saving among themselves in proportion to their ownership.

As to item 151, fire insurance premiums, the facts were

quite similar to those in regard to employers' liability insurance. In finding 58 we have stated the facts relating to the ownership of plaintiff's stock. In the early part of 1917 rates of outside companies for fire insurance went up because of explosions in munitions plants in the vicinity. Those rates went down in October and November 1917, to a point substantially lower than the rates which, as shown hereinafter, plaintiff paid its stockholders.

October 15, 1917, in response to a letter from plaintiff dated October 11, 1917, the Insurance Department of New Jersey wrote plaintiff as follows:

> We received your letter of the 11th instant asking to be advised whether or not it is permissible for three or four of the largest stockholders of a company (with the consent of all the stockholders) to make a contract of indemnity, whereby the stockholders agree to idemnify the company of which they are members against loss of its property by fire, for a small consideration. In reply you are informed that if the contract of indemnity covers the risk of the one particular company only, the proposition does not seem to be contrary to our insurance law; nor does it appear that any approval of the contract by this Department is necessary.

Harriss, Patterson, and a lawyer named Hoyt, who, apparently acted in the stead of A. M. Hoyt and Company, a stockholder, wrote policies of insurance dated September 15, 1917, each for an amount approximately proportionate to the stockholdings of Harriss, Patterson, and Hoyt and Company, respectively. It is inferable that Hoyt and Company did not write a policy because it was a corporation not chartered to issue insurance. What assets Hoyt, the individual, had, with which he could have paid losses on the $400,000 policy which he wrote, does not appear.

The dates, October 11 and October 15, of the correspondence with the Insurance Department, indicate that the policies dated September 15, were written a considerable time after their dates, and that plaintiff paid a considerable sum for insurance that had not been in effect. Since Hoyt, the individual who wrote the policy, was not a stockholder in plaintiff, his policy was not covered by the permission given in the letter from the Insurance Department. Whether it

was lawful for an individual to write an insurance policy on another's property does not appear.

November 26, 1917, Hoyt canceled his policy and at about the same time A. M. Hoyt and Company transferred its stock to Harriss and Patterson, who increased their policies by the amount canceled by Hoyt. From that time each owned twelve twenty-fifths of the stock of plaintiff and carried one-half the insurance. July 1, 1918, Harriss and Patterson each wrote a new policy for $3,500,000 in place of $1,060,000, the amount of their former policies, and at rates of $4.50 per $100 instead of $4.00, the former rate. Some time in September 1918, Hawkins wrote a policy for $291,666.66, dated September 1. Then the policies were in exact proportion to the holdings of stock which were, Harriss and Patterson, twelve twenty-fifths each; Hawkins, one twenty-fifth. Hawkins was paid premiums for the months of July, August, and September, though his policy was dated September 1, and was not written until late in September.

June 30, 1919, the policies expired and no new ones were written. Payments of premiums continued to be made as before, however, through October 17, 1919. The premiums claimed in this suit are those paid beginning February 1, 1918, and down through October 17, 1919. The total amount of these premiums paid within that time was $461,260.73. The amount which the plaintiff here seeks to charge to the shell contracts, as proportionate overhead is $270,729.21.

In tax litigation in the United States District Court for the Southern District of New York, Patterson stated under oath, concerning the insurance premiums dealt with in this finding, and the commissions dealt with in finding 60:

> At the time plaintiff received said amounts he and two other individuals were the sole stockholders of said company. The company at the time said sums were received by the plaintiff was in the process of liquidation and said sums were in fact and law liquidating dividends on the stock owned by the plaintiff in said company.

We find that the payments made by plaintiff to Harriss, Patterson, and Hawkins were not payments for fire insurance, but were distributions of dividends to plaintiff's stock-

holders. No part of these payments is properly chargeable to the shell contracts in this suit.

60. *Item 171. Commissions paid to Harriss and Patterson for endorsing plaintiff's notes to the Government.*—As provided in the supplements to the G contract, the Government advanced to plaintiff $1,000,000 on January 3, 1918, and $725,000 on March 21, 1918. The Government, as a condition of the loan to plaintiff required the endorsements of Harriss and Patterson on the company's notes. The company paid or promised Harriss and Patterson for their endorsements the sum of 5% each or 10% on the face amount of the notes, a total amount of $172,500. A part of this amount, as hereinafter shown, was paid to Hawkins. The loans were repaid to the Government by deductions from payments otherwise due to plaintiff.

The payments to Patterson and Harriss were not in cash, but plaintiff company on January 3, 1918, gave to each party its promissory note in the sum of $50,000, which was paid in full January 28, 1918. In March, when the second loan was made, the company gave each party its note for $36,250, which notes were paid in July 1919. At the time of payment of these notes 4% of the total amount was deducted from the amount paid Harriss and Patterson, and either paid or credited to Hawkins. Hawkins did not endorse the notes given by plaintiff to the Government. The ownership of plaintiff's stock during this period has been shown in finding 58.

The sworn statement of Patterson, made in the tax litigation referred to in finding 59, was applicable to the payment of these commissions, as well as to the insurance premiums considered in that finding.

We find that these payments were not made as compensation for the endorsements of Harriss and Patterson, but as distributions or dividends paid by plaintiff to its controlling stockholders.

61. *Item 154. Reimbursement to W. J. Hawkins.*—Plaintiff, during 1919 and 1920 paid to Hawkins a sum in excess of $100,000 to reimburse him for expenditures made by him during the years 1917 to 1920 which he claimed were company expenses. These expenditures included, among other things,

railroad travel, hotels, club dues, entertainment, bonuses paid to employees. The entire sum is set up as general overhead, and $66,233.72 is included in the claim as the shell portion of this overhead.

The evidence does not justify the allowance of any part of this claim. Some of these expenditures by Hawkins were made before the plaintiff was engaged in the shell contracts, and many of them after the shell contracts had been completed. Most of those made during the time of performance of the shell and the other munitions contracts must have been, on any accurate basis of accounting, attributable to some one or more of the contracts and chargeable thereto, rather than to general overhead. The evidence does not show the contracts to which the expenditures were attributable.

62. *Item 157. Life insurance premium on life of W. J. Hawkins.*—By resolution of plaintiff's board of directors, on June 26, 1918, the company insured the life of W. J. Hawkins for $1,000,000. The sum of $250,000 thereof was to be assigned to Hawkins' family in the event of his death. Plaintiff paid a premium of $33,200.75 to the insurance company and charged the amount to general overhead and allocated to shell contracts $14,929.79. In 1919 after the shell contracts had been performed, the policy was not renewed except as to the portion of the policy of $250,000, which was assigned to Hawkins' family, the premium for which was $8,746.25 charged to general overhead and $5,648.31 apportioned to the shell contracts.

We find that, in the circumstances, it was reasonable for plaintiff to carry insurance upon Hawkins' life. As to the part payable to his family, that was an increase in his compensation. A proper proportion of the premium paid on the 1918 policy is reimbursable shell expense.

The renewal of a part of the policy in 1919 came after the completion of the shell contracts and no part of that premium is a proper shell charge.

63. *Item 172. Interest on Government loans and on disbursements in advance of receipts on shell contracts.*—The Government's advances of $1,000,000 on January 3, 1918, and $725,000 on March 21, 1918, were not used entirely

to finance the shell contracts. Some of the money was used for other purposes. To whatever extent it was used for other purposes, the interest paid to the Government is not a proper shell expense. The extent and duration of such uses is left for further accounting. Payments to the Government should be charged at the actual rates paid, 5% on $1,000,000 and 7% on $725,000, rather than at 6% on the combined amount.

The amount of interest properly chargeable to shell on account of disbursements in excess of receipts during the period of the contracts must be recomputed to take into consideration the specific items which we have allowed and those which we have disallowed as reimbursable shell expenses. The rate of interest will be six percent.

64. *Items 174 to 174F. Post suspension, expenses, and unabsorbed overhead.*—The claims made in these seven items relate (1) to post suspension expenses, being expenditures made or losses suffered by plaintiff during the period following the performance of the shell contracts, and while the plaintiff was liquidating its affairs these expenditures being charged to general overhead and a part apportioned to the shell contracts; and (2) to "unabsorbed overhead," being those portions of its general overhead incurred in the period following the performance of the shell contracts, which, if chargeable to any contract or contracts with the Government, should have been charged to contracts other than shell, but were not so charged because, at least in some cases, those other contracts were settled before the extent of the charges was ascertained.

The only thing which plaintiff did for the Government after it had completed performance of the shell contracts was to permit the Government, for a price agreed upon and paid, to store some of its property in plaintiff's buildings and give it certain care. Plaintiff's other activities during this period were the winding up of its affairs with a view to going out of business, and the preparation and presentation of its claims against the Government. Its overhead expenses during this period were not costs "growing out of" the shell contracts.

The assertion of a claim for "unabsorbed overhead," i. e., expenses belonging to other contracts, or portions of gen-

eral overhead attributable to other contracts, is based upon a letter written to plaintiff by the New York District Claims Board, giving plaintiff permission to include, in its "final claim" before the Board, any overhead expense which, though attributable to other contracts, had not been ascertained in time to be included in their settlement. The evidence does not show that the plaintiff's claim on either of the shell contracts was the plaintiff's final claim presented to the Board. The unabsorbed overhead here claimed was not included in the shell claims before the Board. It did not grow out of the shell contracts.

65. In the tabulation in finding 54, we have found in column 6 that items adding up to $1,247,819.19, included by plaintiff, in its computation upon which this suit is founded, as shell expenses, were not proper charges to the shell contracts, or, as to a small part of the amount named, were credits which the plaintiff should have given, but did not give, the Government. When we subtract this amount from the $12,123,392.62 which the plaintiff claims as its costs on the shell contracts, the remainder is $10,875,573.43. This latter sum is, subject to what is said later in this finding, the amount which we find to have been plaintiff's reasonable and necessary costs in performing its shell contracts. Plaintiff has already been paid $10,888,766.89 on account of the shell contracts. It follows that nothing further is due. In the tabulation in finding 54, we left undetermined the disposition of certain items, because their final computation was contingent upon our findings with regard to other items. The largest of these undisposed of items is No. 172, relating to Interest, which is discussed in greater detail in finding 63. Since plaintiff's claim of $93,-577,26 for interest includes $79,339.14 for interest on expenditures made which are in dispute in this suit, and since we have found that a large part of those expenditures were not reimbursable shell expenses, it follows that a considerable proportion of the $79,339.14 claimed would, after the recomputation, be disallowed. By the amount thus disallowed, plaintiff's found shell expenditures would be still further reduced below its shell receipts. Items 67 and 118 would, upon recomputation, increase the net amount of plain-

tiff's reimbursable expenses by subtracting certain sums from credits which plaintiff has given the defendant. But these increases would not be sufficient to put plaintiff's allowed expenses in excess of its receipts.

It follows that plaintiff is not entitled to recover.

ON THE COUNTERCLAIM

66. Plaintiff did not commit fraud in the presentation and proof of its claims before the New York District Claims Board and the War Department. The Board and the Department did not, in considering those claims and making its awards on them, act under a mistake of law so substantial as to make their awards voidable by the Government after they had been paid.

The court decided that the plaintiff was not entitled to recover, and, further, that the defendant was not entitled to recover on its counterclaim.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is brought pursuant to a special act of Congress, the text of which is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims, notwithstanding the lapse of time or any statute of limitations or any defense because of any awards previously made by the War Department or other authority of the United States or any alleged acceptances thereof by the International Arms and Fuze Company, Incorporated, to hear and determine, upon the basis of just compensation, the claims of the said International Arms and Fuze Company, Incorporated, growing out of contracts numbered G–1048–559–A, dated January 1, 1918, and P–19219–4797–A, dated November 5, 1918, with the United States and the amendments and modifications thereof: *Provided, however*, That from any decision or judgment rendered in any suit presented under the authority of this Act a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.
>
> Approved, June 26, 1934.

The plaintiff, during the First World War, entered into a contract, hereinafter called the G contract, to machine 500,000 155-millimeter shell from forgings to be furnished by the Government. The formal contract was dated January 1, 1918, but conversations and correspondence relevant to its meaning took place before and after that date. Several agreements supplemental to the original one were made. The plaintiff manufactured the shell called for by this contract, and was paid the contract price of $11.50 per shell. Although a notice of suspension of the contract was given the plaintiff after the Armistice, that notice was, in effect, withdrawn, and the plaintiff was permitted to complete performance of the contract. Late in 1918, but before the Armistice, when the plaintiff's performance of the G contract was nearing completion, there were conversations between the plaintiff and officers of the Ordnance Department of the Army looking toward a second contract for the same number of shell. The intervention of the Armistice caused a modification of the plans, but a second contract, hereinafter called the P contract, was signed early in 1919, and was dated November 5, 1918. The defendant claims that this was not a true contract, but an arrangement made by certain subordinate officers in the Ordnance Department for the purpose of enabling the plaintiff to obtain compensation for the cancellation of the supposed contract.

The act of June 15, 1917 (40 Stat. 182), authorized the President to suspend or cancel contracts for war materials and to make "just compensation therefor." Under that act, if a contractor was not satisfied with the award made to him by the executive officers acting for the President, he could accept 75% of the amount awarded, and sue in this court for the additional sum which he claimed as "just compensation."

The act of March 2, 1919 (40 Stat. 1272), known as the Dent Act, authorized the Secretary of War to—

> adjust, pay, or discharge any agreement, express or implied, upon a fair and reasonable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen * * * for the production, manufacture

> * * * of materials or supplies * * * or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: * * *

In May 1919 the plaintiff filed with the New York District Claims Board, one of the boards set up after the Armistice by the Chief of Ordnance to settle claims growing out of the suspension of ordnance contracts, its claim on the G contract. It made claim for $2,118,041.33. The District Claims Board made what purported to be a Dent Act award to the plaintiff, which recited that the G contract had not been "executed in the manner prescribed by law," thus using the language of the Dent Act. The total amount of the award was $1,427,449.81, and the items were: heat-treating expenses, $379,972.50; costs of heat-treating equipment, $93,726.55; annealing hard forgings, $178,906.87; extra cost of machining hard forgings, $480,488.05; expenses caused by delays by acts of the Government, $333,875.72. This award was approved by the Secretary of War.

The plaintiff accepted this award in full satisfaction of its claims under the G contract, and was paid the full amount thereof on February 18, 1920.

On March 21, 1919, the plaintiff filed with the New York District Claims Board a Dent Act claim on the P contract, which recited, as was necessary under the Dent Act, that the agreement was entered into in good faith on or about November 5, 1918, and that the plaintiff had made expenditures or incurred obligations on the faith of that agreement prior to November 12, 1918. The Board made an award, approved by the Secretary of War, for $912,614.81, the sum of a list of items named by the Board in its award. This award found the requisite jurisdictional facts as they were recited in the plaintiff's claim. The plaintiff accepted this award in full satisfaction of its claims under the P contract, and was paid the money on February 26, 1920. In 1934, Congress passed the special act recited at the beginning of this opinion.

The plaintiff claims that our function under the special act is merely to determine what the plaintiff's reasonable and necessary expenditures were in the performance of the two contracts, to subtract from that sum the amounts paid to the plaintiff on the contracts and in the Dent Act awards, and to render judgment for the difference. The defendant urges that even if the plaintiff had, which the defendant denies, lost money on the contracts, the plaintiff can recover nothing as "just compensation" as to the G contract because the contract was performed in full by the plaintiff, it received the contract price, and did not perform any work not called for by the contract. The Government urges, as to the P contract, that it was not a binding contract, and the plaintiff did not perform any part of it, or make any expenditures looking toward performance of it.

The special act, quoted at the beginning of this opinion, gives us jurisdiction "to hear and determine, upon the basis of just compensation the claims of (the plaintiff) growing out of (the G and P contracts)." The Government urges that this act was intended to have the same application as the general act of June 15, 1917, which authorized the President to suspend or cancel contracts for war materials and to make "just compensation" therefor. That statute was interpreted by the courts as involving a species of eminent domain. The cancellation, being authorized by the statute, was not a breach of contract by the Government, but was a taking, for the public benefit, of the contractor's rights under the contract. *De Laval Steam Turbine Co.* v. *United States*, 284 U. S. 61, 70, 71; *Russell Motor Car Company* v. *United States*, 261 U. S. 514, 523, affirming *Russell Motor Car Company* v. *United States*, 57 C. Cls. 464, 488; *Meyer Scale & Hardware Company* v. *United States*, 57 C. Cls. 26, 50. The "just compensation" directed by the act of 1917 included so much of the unamortized portion of the investment in plant and machinery which the contractor had reasonably made to enable him to perform the contract as would have been amortized if he had been permitted to complete his performance, and the reasonable cost to him of materials acquired for the performance of the contract. *Barrett Company* v. *United States*, 273 U. S. 227. Just compensation did not

include anticipated profits. *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123, 125; *Russell Motor Car Co.* v. *United States*, *supra*, at p. 523.

The Government urges that, since in fact there was no cancellation of the G contract, the plaintiff having been permitted to complete it and having been paid the contract price, there can be no basis for "just compensation" such as was provided for by the act of 1917. It urges that any excess of expenditures over receipts was the kind of a loss which any contractor risks when he undertakes a specified performance for a fixed price.

Though there is merit in the Government's argument, it does not persuade us. The problem presented to Congress, when it had under consideration the special jurisdictional act, was that of a contractor which had done a good job of producing important munitions of war when they were badly needed; which had, according to the representations made to Congress, lost money on its contracts; which had been given an allowance by the War Claims Board which one agent of the Board regarded as a sharp bargain on the Board's part on behalf of the Government. The Senate had passed S. 2809, and when that bill came to the House, the House War Claims Committee struck out the entire Senate bill and substituted the language of the bill that became the special act. The Committee's report, in explanation of the substitution, said:

> The purpose of the amendment is to substitute the language of the House bill, which has previously been favorably reported by your committee, for that of the Senate bill. The fundamental difference in the two bills is that under the House bill the case would be tried upon the basis of just compensation or an operating-loss basis, while under the Senate bill it would be tried upon the terms of the contracts and extras incident to the contracts. If the Senate bill is enacted, long and costly litigation would follow, and it would be possible for the claimant to secure a judgment for substantial profits. In the opinion of your committee, this would place the Government at an unfair advantage.
>
> Your committee feels that any company which performed such excellent services in time of war as the

claimant did is entitled to its day in court in an attempt to recoup its losses, especially when it had the written promise of a branch of the War Department that it could file a final claim and was later denied that opportunity.

For these reasons your committee is of the unanimous opinion the amendment should be adopted and the bill enacted into law.

We think, therefore, that our task is to determine what expenditures were reasonably made by the plaintiff which were fairly attributable to the G and P contracts, and to what extent, if any, those expenditures exceeded the amounts already paid to the plaintiff in connection with those contracts. The questions involved are largely questions of fact. The resolution of these questions is made difficult by several circumstances. (1) The plaintiff had many contracts with the Government for the manufacture of munitions, which contracts were being performed concurrently with the G and P contracts. Whether, or to what extent, the purchase of particular machines or services, or other expenditure of money, was attributable to the G and P contracts or to the others, is often difficult to determine. (2) The last work in performance of these contracts occurred early in 1919. What were supposed to be final settlements of the contracts were made in 1920. The special act reopening them was passed in 1934. The first testimony in this suit was taken in December 1935. After such a lapse of time, testimony as to where certain machines were located in the plant and what they were used for; as to how many out of a large number of pieces of equipment owned by the plaintiff were used for the shell contracts and for how long they were used; and as to many other questions whose answers depended upon the memory of witnesses, was naturally and necessarily hazy and vague, and fell short of sustaining the plaintiff's burden of proof. (3) Many of the claimed expenditures, including the largest of those in dispute, were not made at arm's length, but were transfers of the plaintiff's money to the owners of the plaintiff's stock, and in many cases in exact proportion to the ownership of the stock, the transfers being directed by the same persons who were to receive the money. As to

these claimed expenditures, the normal guaranty of necessity and reasonableness which attaches to an expenditure made at arm's length, that the self interest of the expender would keep it from being made at all, or from being excessive, is lacking. In the circumstances of this case, the trier of fact is left in doubt as to some of the items of the claim relating to asserted purchases of intangible things, such as insurance contracts and endorsements of company notes, not only as to the reasonableness of the amounts of the claimed expenditures, but as to whether the transfers of funds were expenditures at all, as distinguished from distributions to stockholders. The purchase of machinery by the plaintiff from a wholly owned subsidiary likewise lacks the normal guaranty of a reasonable price which accompanies an arm's length purchase.

As we have said, the special act had the effect of reopening the whole question of whether the plaintiff has been paid less, and if so, how much less, than it reasonably expended in the performance of the G and P contracts. Thus there is placed upon the plaintiff the burden of justifying each of its thousands of items of expenditure for machines, labor, overhead, etc., which items, the plaintiff claims, add up to a total amount of more than twelve million dollars, some one and a quarter million dollars more than the $10,888,766.89 which, both parties agree, the plaintiff has been paid by the Government. Happily, the area of dispute does not include all of the plaintiff's claimed expenditures. Only those named in a list of 175 items were in dispute before the testimony was taken. As to the others, the parties agree that the expenditures made, in the amounts claimed, were expenditures properly attributable to the shell transactions. We proceed to the consideration of the list of disputed items.

MACHINES, OTHER EQUIPMENT, AND LABOR ON PLANT AND EQUIPMENT

In the disputed list are a number of machines and other equipment, and a few items of supplies, and of labor on plant and equipment. As to most of these, the question was whether the items were satisfactorily proved to have been attributable to the shell contracts and our answer represents our view as

to that proof. As to a few items, while there was oral evidence which might have been sufficient to connect the item with the shell transactions, the plaintiff's records, usually invoices, attributed the items, perhaps mistakenly, to one of the plaintiff's other transactions with the Government. Since these other transactions were in some cases cost-plus contracts and in others were the subject of settlements made by the War Claims Board, we think there is a considerable likelihood that, in view of the plaintiff's written records, these items were taken into account in those other settlements. If so, it would be improper that compensation should again be made in this case. In view of the likelihood which we have suggested, we think the plaintiff had the burden, but did not sustain it, of showing that it had not already been paid for these items. What we have said relates to items 73, 83, 98, 100, 103, 105, 107, 121, 123–126, 140.

A considerable number of machines and pieces of equipment were, as we have seen, acquired by the plaintiff late in 1917 and in 1918 from its wholly owned Canadian subsidiary. These had been used in the Canadian plant for most of a year. The price which the plaintiff charged itself on its books for these acquisitions was the full price paid by the Canadian Company when the machines were acquired by it, plus thirty-five percent of that price which it had paid as duties and taxes. Here we are troubled, as we have said, by the fact that these acquisitions were not arm's-length transactions, so that the mere fact that the price was entered on the books is no guaranty of its reasonableness. The Government contends that the full acquisition price, even without the 35% addition, is too much, since the machines had been used for a considerable time. The plaintiff contends that the trend of prices was up; that machines were hard to get in the open market; that second-hand machines were selling for more than the list price of new machines, which in fact could not be bought, except possibly after great delay. The plaintiff's evidence as to price tendencies was quite general, and did not point to particular machines, though there was variation in the scarcity of machines of different types. On the whole we think, as did our Commissioner, that a fair price to be allowed for the items acquired from the Canadian subsidiary is the

full price which the Canadian Company paid, not including the 35% representing duties and taxes. These observations relate to items 5, 9, 10, 14, 17–19, 21, 22, 38–41, 46, 49, 55, 59, and 60.

SALARIES OF HARRISS, PATTERSON, AND HAWKINS

Dr. Harriss and Mr. Patterson, who were president and treasurer of plaintiff, respectively, held equal amounts of the voting stock of the company, and, between them, had complete control of its affairs. The salaries of each of the two offices held by them were set at $100,000 per year. The plaintiff's claim includes a proportionate part of these salaries as overhead expenses properly attributable to the shell contracts. Reasonable salaries to general executives are proper overhead expenses, and a proper proportion of them is therefore fairly chargeable to the shell contracts. The Government contends that the salaries were unreasonably high, and would have us disallow them entirely on the ground that they were not salaries at all, but were distributions of the plaintiff's assets to its principal stockholders.

This problem, like the ones relating to insurance and commissions, hereinafter discussed, is confused by the complete absence of arm's-length bargaining in the fixing of these salaries. These stockholders could as well have set their salaries at twice the amount, or one-fourth the amount, and no one could have effectively concerned himself about them. They were merely paying to themselves, as individuals, what they owned as owners of the plaintiff corporation. But in this suit it is sought to collect these salaries out of the treasury of the United States. This makes the matter the concern of the Government and necessitates inquiry as to the reasonableness of the salaries.

The plaintiff company had only one plant, and only one customer for its product. Production was its most important, and almost its only problem. Harriss and Patterson do not seem to have been about the plant to any considerable extent. They were wealthy men of numerous and varied interests who had their offices in New York City, where they attended to those interests. They did what they were called upon to do for the plaintiff, but what they did was little, in

amount and importance, in comparison with what W. J. Hawkins did. He was in charge of the plant, and, like Harriss and Patterson, was paid $100,000 a year. The plaintiff urges that Judge Green, who sat as Commissioner during the hearing of a part of the case, discouraged the plaintiff from making fuller proof of the activities of Patterson and Harriss in the plaintiff's affairs. There is some merit in this contention. We think, however, that the plaintiff's evidence on this point, the cross-examination of the plaintiff's witnesses, and the evidence in the case as a whole gives us a reasonably adequate basis for determining the question, and that this question should not be remanded for further trial. We think that the control of this corporation being in Harriss and Patterson, the mere fact that the corporation paid this money to them as salaries raises no presumption of the reasonableness of the amounts. We have concluded that a salary of $20,000 a year each for Harriss and Patterson, to be treated as general overhead of the plaintiff and properly apportioned to the shell contracts, should be allowed as a reimbursable shell expense. The question of the period of time for which these, and other overhead expenses, may be charged, is treated later in this opinion.

SALARY OF W. J. HAWKINS

Hawkins was employed by the plaintiff in 1915, at which time he resigned his commission as a Major in the United States Army, in the Ordnance Department. The 1915 employment contract is quoted in finding 58. It provided for an annual salary of $10,000, payable in monthly installments for five years, and for a cash bonus of $50,000 to be paid to Hawkins upon the signing of the contract. The plaintiff urges that a proportionate part of the cash bonus should be attributed to the period of performance of the shell contract, beginning in 1918, and regarded as a shell expense. We think not. The bonus was paid in 1915 and no strings were attached to its payment which would connect that payment with the plaintiff's operations in 1918. We have, therefore, not allowed any part of the 1915 bonus as a shell expense.

Hawkins' 1915 contract provided, as we have seen, for an

annual salary of $10,000 a year for five years. Apparently for the purpose of securing the payment of this salary, the plaintiff put $50,000 in escrow, and the monthly payments of salary were to be made and were made out of this escrowed fund. Beginning in December 1917, after the shell contracts had been arranged, the plaintiff raised Hawkins' salary to $100,000 a year, $10,000 of which was to be paid, as before, out of the escrowed fund, and the other $90,000 from the general funds of the company. The Government's auditor at the hearing contended that the $10,000 of Hawkins' annual salary which was secured by the 1915 escrow arrangement should not be included as a shell expense, since the plaintiff had irrevocably committed itself to that expenditure long before it received the shell contract. This contention has no merit, and the Government seems to have abandoned it. Hawkins' entire salary of $100,000 a year should be treated as general overhead, and a proper proportion of it is reimbursable shell expense.

FIRE INSURANCE AND EMPLOYERS' LIABILITY INSURANCE

The plaintiff includes among the expenses for which it claims compensation large sums of money paid by it to Harriss, Patterson, Hawkins, and a Mr. Hoyt for premiums on fire insurance and employers' liability insurance alleged by the plaintiff to have been written or undertaken by them.

As is shown in finding 59, commercial fire insurance rates on property such as the plaintiff's were high during the early part of 1917, because of the Black Tom explosion which had occurred in the vicinity. These rates went down in October and November of that year to an amount considerably lower than the rates which plaintiff paid its stockholders. In September 1917, the plaintiff canceled most of its outside policies and, as of September 15, Harriss and Patterson each wrote individual policies for $860,000, and Hoyt wrote one for $400,000, all at the premium rate of $4 per $100 per year, payable monthly, and expiring June 30, 1918. The amounts of these policies were in approximate proportion to the stockholdings of Harriss, Patterson, and Hoyt and Company, which three held substantially all the stock. Hoyt canceled

his policy on November 26, 1917, at about which time Hoyt and Company transferred its stock to Harriss and Patterson, an equal number of shares to each. Harriss and Patterson thereupon each increased the amount of his policy by $200,000. On July 1, 1918, Harriss and Patterson each wrote a new policy for $3,500,000 for one year at a premium of $4.50 per $100 for the period. On that date Harriss owned 120,000 shares of the plaintiff's stock, Patterson owned the same number, less 1 share, Hawkins owned 10,000 shares, and one McCann owned 1 share. The percentages of ownership were thus 48, 48, and 4, except for McCann's one share. About October 1, 1918, Hawkins wrote a policy for $291,-666.66, dated September 1, 1918, which placed each stockholder's policy in proportion to his ownership of shares. Premiums were paid monthly, at the rate of $4.50 per annum per $100. Hawkins was paid the full amount of the annual premium, although two months of the year had passed before its date, and another month had passed before it was actually written. When the policies expired on June 30, 1919, no new policies were written, but payments of premiums were continued through October 17, 1919. The total of such premiums paid to Harriss, Patterson and Hawkins from February 1, 1918 to October 17, 1919 was $461,260.73, and the plaintiff here asserts that that amount was general overhead and claims $270,729.21 of it as proportionate and compensable expenses of the shell transactions.

Up to July 9, 1918, the plaintiff had carried its employers' liability insurance with outside companies. In June the plaintiff applied to the Department of Banking and Insurance of the State of New Jersey for permission not to carry such insurance with outside companies, and to pay compensation without such insurance. It also asked for information as to whether 2 or 3 stockholders could reinsure the liability thus undertaken by the plaintiff. On July 3 the Department granted the plaintiff an exemption permitting it to pay compensation without carrying insurance. The plaintiff was advised that the Department had nothing to do with the matter of reinsurance. Thereupon the plaintiff began to pay Harriss, Patterson, and Hawkins employers' liability insurance premiums, at regular commercial rates, in proportion

to their ownership of the plaintiff's stock. The amount so paid from July 9 to December 1, 1918, was $114,128.29. Compensation paid to employees during that period was about $7,000. These payments were charged back to the three stockholders, in proportion to their holdings. But payments of $24,594.19 made by the plaintiff to employees in 1919, for injuries sustained during 1918 while these premiums were being paid to the stockholders, were not charged back to the stockholders on the plaintiff's books, nor otherwise collected from them. The plaintiff here contends that after making allowance for that failure, $32,600.51 of the amount thus paid to Harriss, Patterson, and Hawkins was a proper direct expense of the performance of the shell contract, and $16,000.15 more of it was a fair proportion of the general overhead expense of that performance. The plaintiff has not proved that any contract of employers' liability insurance or reinsurance was ever written or issued by Harriss, Patterson, or Hawkins.

We think that none of these so-called insurance premiums were expenses of the performance of the shell contract which are compensable in a proceeding such as this. The transactions relating to them, taken as a whole, show that the dominant stockholders of the plaintiff concluded not to pay outside insurance companies for relieving them of the risks of fire and employers' liability, but to bear that risk themselves, and divide the money saved thereby among themselves in proportion to their ownership of the business. On this basis, it made no difference to them that the rates were much higher, as they were in the case of the fire insurance, than the rates at which outside companies would have written the insurance, or that the amount of coverage was higher, as it seems to have been, than the property insured would have justified. When, in June 1918, the policies carrying the already too high rate of $4.00 per hundred per year expired, Harriss and Patterson increased the amount of the coverage by nearly $5,000,000, though no such addition to the value of the property insured was made at that time, and increased the rate to $4.50. In September 1918, it apparently occurred to them that Hawkins, who held one twenty-fifth of the stock of the company, was not sharing equitably in its distributions,

so they permitted him, on about October 1, to write a policy dated September 1, with a coverage in exact proportion to his stock ownership, and they paid him the whole year's premiums from July 1, though three months had passed without loss before his policy was written. As an equitable distribution among the owners of the business, this transaction is understandable. As an arm's-length purchase of insurance protection by the plaintiff, it is not.

When the fire insurance policies of 1918 expired on June 30, 1919, the plaintiff continued to pay Harriss, Patterson, and Hawkins the same monthly sums which they had been receiving on the insurance account, though the policies were not renewed, and though commercial policies, prudently purchased at that time would have been at the reduced rate applicable to an idle plant with watchmen, and for a reduced coverage, since much material had been removed from the plant. These circumstances fit the pattern of a distribution among stockholders, not that of a true shift of the risk of loss from the owner of the business to an outsider, for a prudent price.

We regard the so-called employers' liability insurance for which Harriss, Patterson, and Hawkins were paid, and for which payments the plaintiff seeks compensation, in the same light. Here, so far as the proof shows, no policies were even written. The payments which were made to employees after January 1, 1918, for injuries which occurred during the time that these stockholders were supposed to have been insurers were paid by the plaintiff and were not collected from the supposed insurers. These circumstances, like those relating to the fire insurance, are consistent with a proportionate distribution among stockholders, but are not consistent with a normal purchase of insurance. We think therefore, that the payments are not compensable.

COMMISSIONS PAID BY THE PLAINTIFF TO HARRISS AND PATTERSON FOR INDORSING THE PLAINTIFF'S NOTES

The G contract for shell was dated January 1, 1918. On January 3, 1918, the plaintiff and the Government entered into an agreement supplementary to the G contract, by which the Government agreed to advance $1,000,000 to the plaintiff,

to be repaid by specified deductions from the sums which would otherwise have been payable to the plaintiff upon the completion and delivery of installments of shell under the contract. The plaintiff agreed to give the Government its promissory note for $1,000,000, bearing 5% interest, and indorsed by Patterson and Harriss. The note was executed as agreed, and the plaintiff paid Patterson and Harriss $50,000 each, as commissions of 5% each for their indorsements. Another supplemental agreement, made March 21, 1918, provided for the loan by the Government to the plaintiff of $725,000 upon the plaintiff's promissory note, bearing 7% interest, and indorsed by Patterson and Harriss. Upon the execution of this note, the plaintiff gave its notes to Patterson and Harriss for $36,250 each, as commissions of 5% each for their indorsements. When these latter notes were paid, one twenty-fifth of the combined amounts of them was paid to Hawkins, instead of to Patterson and Harriss. Thus each of the three stockholders received, as to the latter note, a payment in exact proportion to his holdings of stock in the company.

The plaintiff includes in its claim for compensation the $172,500 thus paid by it to the three stockholders. The Government contends that these payments were distributions, and not true expenditures made in order to perform the shell contract. The plaintiff produced several bankers as witnesses who testified that the charge of 5% commission by each of the two indorsers was reasonable. One testified that he would have charged 25% for his indorsement; another that he would not have done it for 15%; another that he would not have done it for 10%, but might have for 15%.

Patterson and Harriss, the indorsers, were, in effect, the owners of the business which borrowed the money. The loan agreement, which was thus their agreement, was that the money should be used for the manufacture of the shell called for by the contract. As rapidly as it was so used, a part of the price of the shell was to be credited on the loan, and their liability as indorsers thus reduced. Except for casualties such as fire, against which they could have insured with outside companies, and against which they

themselves purported to insure, at a high rate of premium, as fast as the borrowed money was put into the work on shell, the loan was paid and the indorsers' liability correspondingly reduced. The indorsers could hardly ask, as individuals, to be paid a premium for the risk that they, as owners and managers of the corporate business, would use the borrowed money for purposes not authorized by the loan, and thus make the loan unsafe.

We think that the facts relating to the ownership and control of the business being what they were, the indorsements of Patterson and Harriss to secure the repayment of the advances of money by the Government to the plaintiff, to be paid out of the agreed price of the finishing of the shell, did not subject the indorsers to risks substantially different from those undertaken by a commercial bonding company which guarantees the performance, by a contractor, of his contract to furnish supplies, such as ammunition, to the Government. The commercial rate for such a bond ranges from one-tenth to one-fifth of one percent. for a liability for a period of two years.

The question is, then, not what risks banker B would regard as involved in guaranteeing the repayment of some two million dollars borrowed by A from C. It is, in effect, what risks A himself thinks are involved, if he uses the borrowed money to produce goods already contracted to be sold to C at a price which A had himself bid. When the Government agreed to advance this money to the plaintiff, supposing that it needed it in order to finance the shell operation, it could not have contemplated that one-tenth of it would be immediately diverted from the manufacture of shell into the pockets of those who, as the owners and managers of the plaintiff company, had borrowed the money to further the performance of the contract.

If Patterson and Harriss had themselves regarded these so-called commissions as compensations for risks incurred by them, there is no reason why they should have divided them with Hawkins, as they did the second commission, in proportion to his ownership of stock. That conduct is consistent with a purpose to fairly distribute dividends,

but is wholly inconsistent with the idea of compensation for risks undertaken. This, in connection with the other circumstances, persuades us that these payments were not intended to be, and were not in fact, commissions, but were distributions of the plaintiff's assets among its stockholders. Patterson, in a legal action relating to his income tax for this period, took the position that these payments and also the insurance premiums, were distributions of dividends and not compensation for the endorsement of the notes. He urged that they were liquidating dividends, and hence not taxable as income. The court in the tax case held they were not liquidating dividends, which we suppose was right, since the plaintiff company was not in liquidation at that time, but in full operation.

POWER, HEAT, AND LIGHT

In keeping its own accounts, the plaintiff apportioned the costs of power, heat, and light purchased by it to the several contracts as overhead, in proportion to the plaintiff's direct labor costs for each of the contracts. In this suit it seeks to increase the charge to shell by the amount $28,370.16 beyond the charge thus made in its own accounts. It asserts that the shell operations were heavier consumers of power per unit of labor than those under its other contracts and that its book account allotment of overhead to shell was therefore too small. We think there may have been some under-allotment of power costs to shell. But the computation which the plaintiff now asks us to accept in place of its former one is not a correct one. It proposes to subtract from the amount of power bought each month after the shell operations started in February 1918, the average amount used in each of the five preceding months, and charge the rest to shell. However, the nonshell work increased, both as to the amount of labor and the number of machines used in it, during the period of the shell operations. All of this increase would, if we adopted the plaintiff's proposed method, be charged to shell. Furthermore, it seems probable that in previous settlements of other contracts the plaintiff's account book method of attributing these costs to the several contracts

was used. If it was, there would be overlapping and double payment if the former method were abandoned in this case. The plaintiff's claim is disallowed in the amount of $28,370.16.

COAL INVENTORY ADJUSTMENT

The plaintiff had on hand in May 1919, 7,450 tons of coal which had cost it, including freight, $50,660.00. The price of coal had gone down so that its value was only $32,631.00. The plaintiff had thus lost $18,029. It includes in its claim $11,643.09 as the proper proportion of this loss attributable to the shell contracts.

Similar claims for this loss on coal were asserted by the plaintiff in the settlement of five of its other munitions contracts with the Government, and the Government paid the plaintiff a total amount of $15,234.51, on account of this loss, in those settlements. The Government should receive credit for that amount, of course.

When the plaintiff received the coal from time to time in 1918, it charged the freight which it paid on it to factory operating overhead. This method of accounting meant that the freight cost was apportioned among the different contracts, and their proper proportion has been paid for in the settlement of those finally settled. A proper proportion of this freight cost is, likewise, included among the legitimate expenses of the shell contracts here in suit. Thus the plaintiff has been or will be paid the $15,234.51 discussed above, and $16,613.50, the cost of the freight, or a total of $31,848.01. Since the plaintiff's total loss was only $18,029, it has already been or will be overpaid, and its claim of $11,643.09 on account of this loss must be disallowed. In addition, the further overpayment which would result from the full allowance of freight as general overhead in this case must be proportionately eliminated by an additional disallowance of $9,246.57, making a total disallowance of $20,889.66. This will still leave the plaintiff considerably overpaid, so far as this coal transaction is concerned, when all of the contracts are considered together.

PREMIUM FOR INSURANCE ON THE LIFE OF W. J. HAWKINS

The plaintiff on June 26, 1918 insured the life of W. J. Hawkins for $1,000,000, $250,000 of which was to be assigned

to Hawkins' family in the event of his death. The premium paid by the plaintiff was $33,200.75, and $14,929.79 was allocated to the shell contracts as a proper proportion of a general overhead expenditure. This insurance was, so far as the $750,000 which the plaintiff would have received upon Hawkins' death, a prudent investment, in view of the plaintiff's dependence upon Hawkins' management. As to the part which was for the benefit of Hawkins' family, it was an addition to his compensation, and reimbursable as such. While the period of one year for which the premium was paid extended considerably beyond the period for which the shell contracts were properly chargeable with general overhead, it is likely that the policy at short rate premiums would have cost almost as much, if terminated on January 31, 1919. We have therefore allowed the $14,929.79. We have disallowed the premium for the renewal of the policy in 1919, because the overhead expenses of the plaintiff at the time of the renewal were no longer properly chargeable to the shell contracts.

INTEREST

The parties are in dispute as to the amount of interest which should be allowed the plaintiff as a shell charge. The Government, by agreements supplemental to the G contract, advanced $1,000,000 to the plaintiff at 5% interest on January 3, 1918, and $725,000 at 7% interest on March 21, 1918, the loans to be repaid by deductions from the contract price for completed shell, at a stated rate of deduction. The plaintiff repaid the loans, and paid the agreed interest in the amount of $85,184.85. It now includes that amount in its claim as a compensable shell expense. The Government contends that the plaintiff did not begin to use the $1,000,000 for shell purposes at the time it received it, but used it to pay off existing debts, and for various other purposes not connected with shell. We think that to whatever extent and for whatever time this and the later advance of $725,000 were used for purposes other than shell, the interest paid by the plaintiff to the Government for the money was not a shell expense. The second disagreement relative to interest is based on the fact that the plaintiff in its claim has computed all interest paid to the Government at six percent. The defendant com-

putes it at 5% until the $1,000,000 advanced by the Government at 5% was used up, then at 7% until the additional $725,000 advanced at 7% was used up, and then at 6%. The defendant's method is the more accurate and should be used if a recomputation were to be made.

Another question relative to interest was necessarily left unsettled until after this stage of the case had been passed. The plaintiff has computed interest upon disbursements made on account of the shell transactions to the extent that those disbursements were in excess of receipts on the shell account. The computations were made for monthly periods. The question of the proper amount of principal upon which interest should be computed was necessarily contingent upon what expenditures we would hold to be properly chargeable to the shell transactions. The determination of the correct amount of allowable interest has not, therefore, been made, and, because, as stated in finding 65, it would not affect the result, the recomputation need not be made.

POST SUSPENSION EXPENSES

Plaintiff seeks to recover, as expenses "growing out of" its shell contracts within the meaning of the special act, its expenditures for two periods, April 1, 1919, to October 31, 1919, and November 1, 1919, to February 1, 1920. The plaintiff uses these dates because, it says, by April 1, 1919, all manufacturing operations upon shell had ceased; by November 1, 1919, the Government had removed the last of its property from the plaintiff's plant, and by February 1, 1920, the awards made to the plaintiff by the War Contracts Settlement Board had been paid. The Government contends that the manufacturing operations had ceased by February 7, 1919, and that that date, rather than April 1, is significant. The plaintiff, listing all of its expenses for the periods named, tabulates those expenses in two separate lists.

In one list it attributes some 65% of the expenses to the shell contracts as a proper proportion of the plaintiff's general overhead, the proportion being based upon the ratio of direct labor on shell during the last 3 months of 1918, to direct labor on the plaintiff's other contracts during the

same period. The Government properly objects to the proportion, since the overhead, if allowable at all, would be allowable as a sort of winding-up expense during a period when no direct labor was being performed on any of the contracts, and the selected period, the last three months of 1918, was the period when shell production was at its highest, and accounted for a much higher proportion of direct labor than it had, on the average, for the full year period of shell production.

In the second list, the plaintiff includes the rest of its expenditures for the two periods named above, which concededly had no relation to the shell contracts, either directly or as apportioned overhead. It calls these items "unabsorbed overhead" and seeks to justify their inclusion in this suit by pointing to a letter written March 4, 1919, by the New York District Claims Board, and referred to in finding 64, as well as later in this opinion. We consider "unabsorbed overhead" later herein. We now take up the first part of the plaintiff's claim.

(A) GENERAL OVERHEAD APPORTIONED TO SHELL

All manufacturing work on shell was completed by February 7, 1919. The plaintiff had been aware long before that time that the Government was winding up its munitions work. Some of the Government's machines and other property remained in the plaintiff's buildings until November 1, 1919. The plaintiff made an agreement with the Government as to the fair price of this storage, $13,750.92, of which $2,859.32 was on account of shell materials, the balance being for materials related to other contracts. Apart from this storage, the plaintiff's only business with the Government after that time was to prepare and present its claims, under the applicable statutes, on its several contracts with the Government. Yet the plaintiff now includes in this portion of its claim all of its expenses, not only for the period while the storage continued, but for three months thereafter, except such of its expenditures for the same periods as it had already included in its claim under another category. These other expenses were the salaries of its executive officers, its payments to its stockholders on

account of insurance, and other items. The plaintiff's accountant attributed these payments to the period before April 1, 1918, the so-called productive period, though they were made thereafter, because of what he described as "legal commitments * * * made during the productive period." There is however no evidence of such legal commitments. We conclude, therefore, that the period during which general overhead expenses of the plaintiff were properly chargeable to shell ended February 1, 1919. While there were some slight manufacturing activities during a few days following that date, that fact is balanced by the fact that during the days before that date, the shell activities were slight, and did not justify the portion of the overhead attributed to them. The amounts claimed by the plaintiff as post suspension general overhead apportioned to shell are disallowed.

(B) UNABSORBED OVERHEAD

The plaintiff has also included in its claim those portions of post-suspension overhead which were, on the basis of apportioning overhead among its several contracts with the Government on a proportionate basis, chargeable to contracts other than shell. Many of the items in this part of the plaintiff's claim would on any normal basis of accounting, have been completely attributable to contracts other than shell, and would have had no relation whatever to the shell transactions, even on a proportionate overhead basis. The plaintiff justifies its introduction of these items into this claim by pointing to a letter written to it by the New York District Claims Board on March 4, 1919. That letter recites that in settling the plaintiff's claims upon several of its contracts theretofore settled, "an estimate was agreed upon as to the cost of unabsorbed overhead incurred by you during the time of suspension on each of your contracts and the final closing down of all work in connection with such contracts" and that the Board and the plaintiff had agreed "to divide the estimated cost of unabsorbed overhead pro rata among the different contracts held by your company." The letter then purports to give to the plaintiff the privilege of submitting, in connection with its "final claim" a statement of the exact cost of

unabsorbed overhead which, if it proved to be greater than the agreed estimated amount, would be an item to be considered in the "final claim." This letter also purported to give the plaintiff the privilege of re-presenting in its final claim "certain items which have been rejected from previous claims."

The plaintiff urges that the shell claim was the final claim and that therefore, under the authority of the letter from the District Claims Board, it may include these claims though they are unrelated to shell, among its claims in this suit.

The letter from the Board related, of course, to claims filed before the Board. Whether one or the other of the shell claims filed with the Board was the last claim filed, has not been proved. One of plaintiff's counsel stated[3] before the House Committee which in 1933 was considering H. R. 12981, a bill substantially identical with the special act under which this suit is brought, that the claims before the Board relating to the two shell contracts were not the last claims, since if they had been "it would have been the duty of the company to include the unabsorbed overhead and other items in such claim because it would have been the 'final claim' to which Colonel Adam's letter refers." It may be inferred from this statement that these items of "unabsorbed overhead," here presented, were not in either of the shell claims when they were adjudicated by the Board. Neither were they, apparently, in whatever claim was the "final claim."

Whatever we might think of the merits of these items of "unabsorbed overhead," we have no jurisdiction to adjudicate them. The special act gives us jurisdiction to hear and determine the claims of the plaintiff "growing out of contracts numbered * * * (the shell contracts) * * * and the amendments and modifications thereof." These items of unabsorbed overhead did not grow out of the shell contracts. They had no relation to these contracts. The letter from the District Claims Board purported to say only that such items could be physically included in and considered at the same time with the final claim which the plaintiff would file with the Board. Even if they had been so physically included, that would not have made them claims "growing out of the

[3] Hearings, pp. 10, 11.

shell contracts" within any ordinary meaning of that language. Special acts are to be strictly construed. Only by going to the opposite extreme from that canon of construction could we bring these items within our jurisdiction. They will, accordingly, be disallowed.

THE DEFENDANT'S COUNTERCLAIM

The Government pleaded, in addition to its denial of any right in the plaintiff, a counterclaim asking for the refund by the plaintiff, with interest, of the amounts of the awards paid to the plaintiff in 1920 in the Claims Board settlements of the G and P contracts. The amounts of these payments were $1,427,449.81 on the G contract, and $912,614.81 on the P contract. It urges that these awards were made and paid under "mistakes of fact and law induced by plaintiff's fraud."

The plaintiff in this suit is, of course, crediting the Government with the amounts paid it under those settlements. If the counterclaim were sustained, that credit would be canceled and the amount appearing on the plaintiff's side of the accounting in the principal suit would, we suppose, be correspondingly increased. That would result in plaintiff's receiving a judgment in the principal case for substantially the principal amount which would be taken from the plaintiff on the counterclaim, i. e., the amount of the payments made to the plaintiff in the 1920 settlements. We say "substantially the amount" since it will be remembered that we have found that the plaintiff's shell expenses and the amounts paid to the plaintiff on the shell contracts were substantially equal, the latter being in excess of the former by a small ascertained amount, which amount would be somewhat increased if final computation of the interest involved in item 172 were made. The net result, then, of sustaining the counterclaim would be that the Government would recover on its counterclaim, so far as the principal of the sums paid the plaintiff in the 1920 settlements is concerned, that relatively small difference.

But the Government, as we have said, demands interest upon the amounts paid to the plaintiff in 1920. The interest would be a large sum, and would require a large judgment in favor of the Government, unless, in turn, the interest paid on the counterclaim should be regarded as a shell expense,

thus canceling itself. We suppose that it would not be a shell expense, within the scope of this suit.

The plaintiff urges that, regardless of the merits of the counterclaim, a judgment upon it should not include interest, since the Government, if it now has a right to recover the 1920 payment, could have sued upon that right at any time since 1920, and its laches in not so suing should at least prevent it from recovering interest. It also says that no interest is recoverable until a demand for payment has been made, and that no demand was made by the Government for the return of the awards until its counterclaim was filed in 1940.

These are interesting, as well as difficult, questions. We do not reach them, however, because we have concluded that the defendant has not sustained its counterclaim on the merits.

FRAUD

We do not think the plaintiff made fraudulent representations in its claims filed with the District Claims Board. As to the P contract, the plaintiff had, at the time of the negotiation of the G contract, late in 1917, desired a contract for 1,000,000 shell, rather than 500,000, the number provided in the G contract. It had been told that if it produced the 500,000 shell satisfactorily other contracts would be forthcoming. As shown in findings 36 to 45, direct negotiations for a second contract began in August 1918, and by the end of September the Ordnance Department had decided to give the plaintiff an additional contract and purchase a part of its machinery. On October 14, the Department wrote the plaintiff giving the details of a contract which had been orally negotiated before that date. That letter was not written by an officer who was legally authorized to make final contracts, and it so stated, but it would, normally, have been followed by a formal contract, but for the intervention of the Armistice. Because of that fact, the Department felt obligated, after the Armistice, to give the plaintiff a formal contract, dated November 5, in order that the plaintiff might have the same remedies as if the formal contract had been made at that date.

In these circumstances, it was not fraudulent for the

plaintiff to assert a claim under the Dent Act, the District Ordnance Claims Board of New York having sent forms and instructions for filing claims to the plaintiff both before and after the date of the enactment of the Dent Act, March 2, 1919. The statements in the plaintiff's claim on the P contract, that "the claimant had performed the agreement in whole or in part, or had made expenditures or incurred obligations upon the faith thereof, prior to November 12, 1918," had little in the way of facts to support them, but the Ordnance Department's officials, when they armed the plaintiff with a formal contract for the purpose of enabling it to make a claim, knew the facts as well as the plaintiff did. They apparently regarded the two shell transactions as being closely related, as in fact they were, in the sense that both parties had contemplated, from the beginning, that the plaintiff would machine additional shell beyond those called for in the first contract.

As to the G contract, the Government served a suspension notice after the Armistice. The plaintiff would have had a right to file a claim under the act of 1917 on account of that suspension. The fact that the Department made an award under the Dent Act, as for an imperfectly executed contract, rather than for a suspended contract, does not reflect on the plaintiff's good faith in filing its claim. The whole matter of heat treatment was greatly confused, in the parties' dealings, and the plaintiff had reason to feel that it had a presentable claim for additional compensation on that account. The same was true with regard to the condition of the forgings as to hardness and lack of specified shape. In these circumstances we think that the Claims Board and the War Department, being fully aware of the facts, did not act under any misapprehension or mistake of law so serious as to make their awards recoverable on the Government's counterclaim.

The plaintiff is not entitled to judgment on its claim, nor the defendant on its counterclaim.

It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

AMERICAN MAIL LINE LTD., A CORPORATION, v. THE UNITED STATES

[No. 45446. Decided April 3, 1944]

On the Proofs

Just compensation; taking of shipping facilities by the Government; measure of compensation.—Where the Government takes over shipping facilities to meet an emergency, for the purpose of removing American citizens from a danger zone, under the provisions of the Fifth Amendment, the Government is under a duty to give just compensation, which must be measured by the loss occasioned to the owner by the taking. *Bauman* v. *Ross*, 167 U. S. 548, 574, cited.

Same; evidence insufficient.—In the instant case, it is *held* that the evidence adduced is insufficient to establish that further payments, in addition to the payments already made by the Government, are necessary to give the plaintiff just compensation for the taking of its ship.

Same; items allowed by Government not eliminated from consideration.—Items of expense or loss allowed by the Government in its settlement with plaintiff are not thereby eliminated from consideration, in a suit for additional payments, in determining the amount of just compensation.

Same; evidence excluded on plaintiff's objection as irrelevant not to be considered by the Court.—Where the Government offered in evidence itemized statements prepared by the plaintiff and submitted by it to the State Department in connection with the presentation of plaintiff's claim to the Department; and where these statements, upon the plaintiff's objection as irrelevant, were not admitted in evidence by the Commissioner and inquiry as to their basis and accuracy was thus prevented; their use to support the plaintiff's case before the court would be improper.

The Reporter's statement of the case:

Mr. John Ambler for the plaintiff. *Messrs. Grosscup, Morrow & Ambler* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, American Mail Line Ltd., is, and at all times mentioned herein, has been a corporation duly organized and existing under the laws of the State of Nevada.

2. In 1937 and for many years prior thereto, plaintiff operated the steamer *President Jefferson* and three sister ships, the *President McKinley*, *President Grant*, and *President Jackson*. These ships were of approximately the same capacity, construction, tonnage and speed.

In August 1937 plaintiff was operating these vessels on a combined passenger and cargo-carrying service between American ports on Puget Sound and the Orient. The ships sailed from Seattle, Washington, to Victoria, British Columbia; thence to Yokohama and Kobe, Japan; Hong Kong and Shanghai, China, and thence to Manila, Philippine Islands, and returned via the same foreign ports to Seattle.

3. Plaintiff operated these four ships on a regular fortnightly "liner" service. One of the ships was scheduled to sail from Seattle, Washington, at 11 o'clock a. m. every second Saturday and one was scheduled to arrive from the Orient every second Wednesday afternoon at 3 o'clock, and to depart on the second following Saturday.

Plaintiff did a considerable amount of advertising and issued a substantial number of printed schedules showing the departure and arrival dates of the vessels at the various ports on the round trip. One of these sailing schedules, relating to the period in question (defendant's Exhibit 28) is made a part of this finding by reference. This schedule contains at the bottom of the page listing the sailing dates the conventional notice, "Subject to change, cancellation or individual postponement without notice."

4. During the period herein involved, certain other steamship lines, including the Canadian Pacific Steamship Company, the Dollar Steamship Line, the Blue Funnel Line, and N. Y. K., a Japanese line, operated services competitive with the plaintiff and with each other from British Columbia, Puget Sound and California to the Orient. All these lines transported both passengers and freight in "liner" service on regularly scheduled routes, having fixed sailing dates which were widely advertised throughout the United States, the Orient and elsewhere.

Plaintiff in the preparation of its sailing schedules attempted to space the departure dates of its vessels between

the sailing dates of its competitors in the trans-Pacific trade. Staggering the sailings in this manner avoided accumulations of passengers, mail and freight and furnished better service, and resulted in more regular and dependable revenues for the plaintiff.

5. A "liner" service is quite different from the irregular type of service known as "tramp" operation and in which a so-called tramp steamer is operated only when, where, and as cargo is offered. In liner service the traveling public, shippers and consignees count on regularity of service. This is especially true with respect to arrival and departure dates of mail, and of cargo such as perishable refrigerated foodstuffs.

Satisfactory operation depends upon regularity of sailings, and the dislocation of one vessel throws the schedule off balance. A vessel off schedule either takes cargo from the vessel scheduled to sail ahead of it to avoid sailing light or takes cargo which is being collected for the next succeeding sailing, or does both. Passenger service is likewise disrupted by an off-schedule sailing. Because of these various factors plaintiff made every attempt to maintain its schedule. When forced off schedule by weather, accident or other circumstances plaintiff, in order to return the vessel to its regular place in the schedule, would make extra expenditures, in operating the vessels at excess speed while at sea and in obtaining overtime work in port to expedite the unloading and loading of cargo.

6. July 17, 1937, the *President Jefferson* sailed on schedule on voyage 67 from Seattle westbound on her customary route to the Orient and Manila. On or about August 16, 1937, when she arrived at Shanghai on her homeward voyage from Manila to Seattle, she was ordered by the United States Civil and Naval authorities to embark to capacity American women and children and others evacuating Shanghai in the emergency existing at that port and to return with the evacuees to Manila. The orders for this diversion were issued by the United States of America through Admiral H. E. Yarnell, Commander in Chief of the United States Asiatic Fleet, and C. E. Gauss, American Consul

General at Shanghai. The written communications received by the plaintiff were as follows:

To: Oscar G. Steen, Esquire, General Manager for the Far East, American Mail and Dollar Steamship Lines, Shanghai, China.

1. In view of the extreme emergency of the existing situation at Shanghai, we are obliged to direct and require that you issue immediate orders to the American-flag ships of your lines as follows:

S. S. *President Jefferson*, due off Shanghai today, the 16th of August, 1937, en route from Manila, Philippine Islands, to the United States; to embark to capacity American women and children and others and then to proceed to Manila, Philippine Islands.

* * * * *

3. You will require all persons to pay their passages either in cash or by arrangement acceptable to your company. Arrangements have been made to pay the passage of certain emergency destitute cases out of funds made available through the American Consul General to the American Emergency Committee.

4. In the matter of additional personnel in the stewards' departments on the steamers named, in order to prepare food and care for the additional passengers, principally American women and children, it is confirmed that you have been instructed by the American Consul General that in the present extreme emergency and in the absence of American personnel available in Shanghai for the purpose, you may employ qualified Chinese so far as may be necessary.

5. It is confirmed that you have established the rates of passage as follows: * * *

6. The action necessarily taken by the undersigned in the existing emergency in directing and requiring you to make the dispositions and arrangements as above set out is being reported immediately to the American Government.

H. E. YARNELL (Signed)
H. E. Yarnell,
Admiral, U. S. Navy,
Commander-in-Chief, U. S. Asiatic Fleet.
C. E. GAUSS (Signed)
C. E. Gauss,
American Consul General.

To: Oscar G. Steen, Esquire, General Manager for the Far East, American Mail and Dollar Steamship Lines, Shanghai.

The Commander-in-Chief, U. S. Asiatic Fleet, and I have considered the matter of the release from direction by the American authorities of the *President Jefferson* and the *President Hoover*, and the matter of the future movements of the *President McKinley*, and other ships of your lines.

I now inform you of our conclusions as follows:

All your ships are released from direction and control, subject to the following conditions:

(1) All outward and homeward bound ships will be expected to include Shanghai on their schedules (except the *President Jefferson*, which, if you prefer, may be sent home without touching at Shanghai, carrying Americans from Manila who wish to reach the United States); it being desired that facilities be continued for the departure of American and Philippine citizens from Shanghai for the United States and Manila.

(2) Space shall be reserved on all ships returning to the United States in order to provide passage home for Americans who desire to leave Shanghai. The American Emergency Committee acting under the direction of the Consul General is endeavoring to register all Americans who desire passage to the United States. It is also registering Americans and Philippine citizens wishing to proceed to Manila, and it is desired that provision be made for such persons on ships bound to Manila.

The information compiled by the American Emergency Committee will be communicated to you as soon as possible in order that you may make necessary arrangements.

We must ask that preference be given out of Shanghai to American and Philippine citizens, others being provided transportation only after the preference requirements have been met as to each ship.

Very truly yours,

C. E. GAUSS (Signed)
C. E. Gauss,
American Consul General.

7. The *President Jefferson* transported the evacuated passengers from Shanghai to Manila, where they were disembarked, and then proceeded from Manila directly to Kobe,

Japan, thus omitting the usual calls at Hong Kong and Shanghai on the homebound voyage. It arrived at Kobe, Japan, August 26, 1937, seven days behind schedule.

8. The normal scheduled trans-Pacific run from Yokohama to Victoria, B. C., was usually made in twelve days, with a customary average speed of 15.6 knots per hour. Seven of the ship's boilers were normally used to maintain this speed. August 26, 1937 (Pacific time), plaintiff's superintendent at Seattle radioed the Master of the *President Jefferson* as follows:

> Weather and conditions of machinery permitting make up one day trans-Pacific do not exceed seventeen and one-half knots when did you leave Yokohama when expect arrive Williamshead.

The vessel followed these instructions on the run from Yokohama to Victoria, and made up one day, arriving at Seattle September 7, 1937, six days behind schedule. To maintain the additional speed required, she used eight boilers and consumed more fuel oil than she would have used if the crossing had been made at her normal speed.

9. Upon arrival of the *President Jefferson* at Seattle extraordinary measures were taken to discharge and load cargo in the shortest possible time. This was done by working longshoremen overtime. Five of the six days were made up and the ship was ready to sail at noon Sunday, September 12, 1937, which was one day after her scheduled date of departure.

10. The extra expenditures for fuel and overtime referred to in the two preceding findings were incurred in good faith in the belief that the vessel would sail when loading was completed. Though, as stated above, the ship was loaded and ready to sail on September 12, the crew refused to sail because of a labor dispute over the employment of an extra man in the galley. This dispute resulted in the ship's losing four days' time, finally sailing on trip 68 on September 16, 1937.

11. The printed schedule of the American Mail Line sailings referred to in finding 3 (defendant's Exhibit 28) covers the period from the sailing from Seattle of the *President*

McKinley, February 13, 1937, to the sailing of the *President Jackson*, June 4, 1938, and the arrival at Seattle of the *President McKinley*, March 31, 1937, to the arrival of the *President Jackson*, July 20, 1938. A comparison of the scheduled sailings and arrivals contained on the printed schedule with the actual sailing dates appearing by the records of the plaintiff submitted to the United States Maritime Commission, is shown in Exhibit A attached to a stipulation filed on December 23, 1942, which is made a part of this finding by reference.

This comparison shows a large number of delayed sailings and arrivals at the various ports, particularly in the Orient, and subsequent to the state of emergency arising at Shanghai in August 1937. After August, Shanghai was omitted both on the outgoing and return voyages of the plaintiff's vessels. The comparison indicates an endeavor to make up time on the turnaround at Seattle and sail on schedule out of Seattle. It shows in the arrivals at Seattle from March 31, 1937, to May 25, 1938, when the *President Jackson* arrived at Seattle, twenty late arrivals from the Orient out of a total of thirty, whereas there were only eight late departures out of a total of thirty-three from Seattle between the sailing of the *President McKinley* on February 13, 1937, and the sailing of the *President Jackson* on June 8, 1938.

12. The engine room log book of the S. S. *President Jefferson* relating to voyages 66 to 69, inclusive, defendant's Exhibits 30–A and 30–B, shows that voyage 66 was terminated at 12 midnight July 7, 1937, and that voyage 67 started the morning of July 8th, the vessel being at Pier 41, Seattle. The log book indicates that on the morning of July 9 the vessel was moved to Todd's drydock. Subsequent entries indicate that the vessel was in drydock until the afternoon of July 11, 1937, when the entry indicates the ship was floated 5 to 6 p. m. and moved to Tacoma. Voyage 67 was terminated at midnight September 7, 1937, and there is no record in the engine log book of any other drydocking of the ship for the period covered by voyage 67.

13. A claim was duly filed with the Department of State

relative to special expenses incurred in consequence of the diversion and use by the Government of the *President Jefferson*. In connection with this claim an amended statement was filed with the State Department dated October 19, 1939, totalling $30,307.69. This statement was as follows:

Second Corrected Bill No. 1022
SEATTLE, WASHINGTON,
October 19, 1938.

UNITED STATES OF AMERICA,
DEPARTMENT OF STATE,
Washington, D. C.

To : AMERICA MAIL LINE LTD., Dr.

Correcting our Amended bill dated April 27, 1938: Revenue Deficit; Special Expenses incurred; and Cancelled Revenue resulting from requisitioning by Admiral H. E. Yarnell, U. S. N., and Hon. C. E. Gauss, American Consul General, of the S. S. *President Jefferson* at Shanghai, China, August 16, 1937.

Scheduled Arrival, Kobe, Japan, August 19, 1937, 7:00 A. M. Actual Arrival Kobe, Japan, August 26, 1937, 7:00 A. M. Requisition Time—7 Days. Average Revenue per Day (based on two previous voyages)		$2,414.60	
Exhibit "A"—Revenue Deficit			$2,717.53
Revenue value of Requisition Voyage, 7 days at $2,414.60		$16,902.20	
Revenue collected on Requisition V,oyage		14,184.67	
Extraordinary Expenses incurred on Requisition Voyage, and Expense of Restoring steamer to schedule			21,223.41
Voyage 67		$12,108.81	
Exhibit "B"—Additional price paid for fuel consumed	$5,033.70		
Exhibit "C"—Additional fuel consumed in making up time	1,224.00		
Exhibit "K"—Extra Chinese crew for requisition voyage	72.20		
Exhibit "L"—Expense of repatriating Chinese crew	71.89		
Exhibit "D"—Extra longshore overtime at Seattle	5,109.74		
Exhibit "E"—Overtime for crew	407.78		
Exhibit "F"—Deviation Insurance	189.50		

Voyage 68		$9,114.60	
Exhibit "G"—Longshore overtime at Seattle and Tacoma	$4,099.75		
Exhibit "H"—Additional fuel making up time	5,014.85		
Exhibit "J"—Eastbound Revenue booked at Shanghai, cancelled and not rebooked			$6,366.75
Total			30,307.69

*14. After correspondence and negotiations between plaintiff and the State Department, the latter accepted and paid, with some adjustments, some of the items set forth in the preceding finding. It declined to pay the following four items, in connection with which plaintiff reserved its right to sue for their collection:

Voyage 67 Additional fuel oil consumed in making up time	$1,224.00
" " Extra longshoremen overtime at Seattle	5,109.74
Voyage 68 Longshoremen overtime at Seattle and Tacoma	4,099.75
" " Additional fuel making up time	5,014.85
	15,448.34

Copies of correspondence between the State Department and plaintiff, together with documents connected therewith, Exhibits A, B, C and D forming a part of a stipulation filed January 13, 1943, and Exhibits E to K forming a part of a stipulation filed September 1, 1943, are made a part of this finding by reference.

15. At the beginning of the hearing in this case before the Commissioner, plaintiff's counsel waived any claims with respect to the subsequent voyage 68 and indicated that the present claim was only for the additional fuel oil consumed on voyage 67 in speeding up the vessel between Yokohama, Japan, and Seattle, Washington, and the increased longshoremen's overtime in making up the time in Seattle to put the vessel back on schedule.

16. On trip 67 the *President Jefferson* refueled at Yokohama and Manila, purchasing some 13,713 barrels of fuel oil at these two ports. The price paid at Yokohama was $1.53 per barrel and at Manila, $2.00 per barrel. This fuel oil was intermingled in the ship's tanks. Mr. March, who had

been Chief Engineer of the *President Jefferson* for sixteen years, conferred with Mr. Jacobsen, who was port engineer of plaintiff company, regarding the amount of additional fuel oil consumed in operating at increased speed to make up the one day's time in the run from Yokohama to Seattle on voyage 67, and as a result of this conference it was estimated that 800 barrels had been used for this purpose. The item of $1,224 originally presented to the State Department as the cost of this additional fuel oil, was obtained by applying to the 800 barrels the lower cost of $1.53 per barrel.

17. Fuel oil consumption per mile of travel in general increases with the increased speed of a ship. The quantity of fuel oil used on a given run is not only dependent upon the speed of the ship but also upon many other factors such as weather conditions, direction of winds, condition of machinery and the amount of cargo carried.

Plaintiff's Exhibit 1, a copy of the "engineer's log and fuel report" for the eastbound portion of voyage 67, shows that the distance from Yokohama to Victoria is 4,220 miles. It further indicates that in making this run the total running time in hours was 241.70 at an average speed of 17.46 knots per hour, and that for the eastbound trip the vessel had an average displacement of 15,280 tons. The log shows that the total amount of fuel oil consumed on the 4,220-mile run from Yokohama to Victoria was 8,750 barrels which is at a rate of consumption of 36.20 barrels per hour, eight boilers being used.

18. Defendant's Exhibits 38–N, 38–O, 38–P, 38–Q, and 38–S are similar engineer's logs and fuel reports of eastbound trips 63, 64, 65, 66 and 69. The following tabulation is taken from these five trips, on all of which the 4,220-mile run was made from Yokohama to Victoria in twelve days and with seven boilers in operation:

Trip	Running time in hours	Knots per hour	Average displacement in tons	Total oil—barrels	Barrels per hour
63E	260.33	16.21	15,280	8,200	31.50
64E	267.70	15.76	16,076	8,000	29.88
65E	259.72	16.24	17,688	8,850	34.07
66E	267.80	15.75	15,280	8,600	32.11
69E	268.28	15.72	16,076	8,750	32.61

Omitting trip 65 east because of the relatively high displacement as compared with the remaining trips, and averaging the remaining data, an average running time for the 12-day trip is 266.03 hours with an average total fuel oil consumption of 8,387 barrels, the consumption of oil for the four trips being at an average rate of 31.52 barrels per hour.

While these logs show the approximate weather conditions each day, there has been no testimony presented to show what effect, if any, the various weather conditions would have on the oil consumption.

A comparison of eastbound trips 63, 64, 66 and 69, which were 12-day trips, with the eastbound voyage 67 shows an excess of fuel oil for trip 67 of 363 barrels. Applying plaintiff's figure of $1.53 per barrel to this amount of excess oil gives a reasonable cost of the extra oil consumed of $555.39.

19. The cost of the overtime work by the longshoremen referred to in finding 9 was, according to plaintiff's records, $5,109.74. Plaintiff's records for eight previous voyages of its various ships from June 10, 1937, to October 9, 1937, show an average of longshoremen's overtime of $1,977.22. Subtracting this latter figure from the former, the cost of the excess longshoremen's overtime used at Seattle in the turn-around after trip 67 was $3,132.52.

20. In its reasonable effort to restore the *President Jefferson* to normal schedule after its diversion by the Government, plaintiff incurred additional costs in extra fuel oil and longshoremen's overtime in the amount of $3,687.91.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff operated several liners on scheduled sailings from Seattle to Manila by way of ports in Japan and China. In August 1937, the Department of State, to meet an emergency which had arisen at Shanghai, directed the plaintiff to cause its ship, S. S. *President Jefferson*, which was then off Shanghai on its return journey from Manila, to embark to capacity American women and children at Shang-

hai and take them to Manila. The plaintiff was directed to collect fares from all passengers except certain destitute ones whose fares would be paid from emergency funds controlled by the Consul General.

The plaintiff obeyed the direction and after discharging the passengers at Manila, resumed her homeward voyage, but omitted her scheduled calls at China ports. She arrived at Kobe, Japan, August 26, 1937, seven days behind schedule. She speeded up her normal 12 day journey from Yokohama to Victoria, B. C., and made it in eleven days, using $559.39 worth of fuel oil more than would have been required for the usual run. She arrived in Seattle six days behind schedule, but, by working longshoremen overtime at unloading and loading, at a cost of $3,132.52 more than normal, she was ready to sail on her next journey September 12, only one day behind schedule. Because of a strike of her seamen, she did not actually sail until four days later.

The plaintiff filed a claim with the Department of State for compensation for the ordered diversion. This claim included a charge of $2,414.60 per day, the average amount of the plaintiff's normal revenue for seven days, but deducting from the product the fares collected from the passengers from Shanghai to Manila; a charge for the eastbound revenue which the plaintiff had had booked at Shanghai which had been canceled and not rebooked; a charge which apparently was for the higher price which the plaintiff had to pay for the fuel oil at Manila; and certain charges for extra crew service and insurance. These charges the Department allowed and paid.

The plaintiff's claim also included other charges arising out of the fact that its ship had been thrown off schedule by the diversion. Some of these related to the next succeeding voyage out of Seattle, and are not pressed in this suit. The ones which are here pressed, and were disallowed by the Department are $1,224.00 for additional fuel consumed in making up time, and $5,109.74 for extra longshore overtime at Seattle. We have found that the amounts actually spent for these two items were $559.39 and $3,132.52, respectively. We now reach the question whether the plaintiff may recover the amount of these expenditures.

When the Government took the plaintiff's facilities to meet the Shanghai emergency, it was under a duty, under the Fifth Amendment to the Constitution, to give the plaintiff just compensation. The act appropriating funds to the Department of State to meet unforeseen emergencies in its foreign service, 50 Stat. 770, the money to be expended in accordance with the provisions of 31 U. S. C. 107, would seem to have provided money for that purpose. When the plaintiff's ship was diverted, the threatened disruption of its schedule and the losses which would follow that disruption, were evident, and should have been to whatever extent they occurred considered in computing compensation.

It was prudent for the plaintiff, its ship having been put behind schedule, to take reasonable measures to restore it to schedule. The expenditures for extra oil to shorten the return journey by a day, and for extra overtime for longshoremen at Seattle to shorten the period of unloading and loading, were reasonable, and probably had the effect of mitigating the losses caused by the diversion.

Though the taking of the plaintiff's ship for a public use required compensation, under the Fifth Amendment, and in the circumstances, probably created a promise implied in fact on the part of the Government to make compensation, nothing in the circumstances is of any assistance to us in determining how that compensation should be measured. We must, therefore, rely upon the general doctrine that just compensation must be measured by the loss occasioned to the owner by the taking. *Bauman* v. *Ross*, 167 U. S. 548, 574.

The evidence does not show what the plaintiff's loss was. It submitted a bill to the Department of State which, as we have said, listed many items. Some of those were allowed and the ones here in suit were not. We do not, however, regard the Department's treatment of the items allowed as a final disposition of those items which eliminates them from consideration in this suit which the plaintiff has brought because of its unwillingness to accept the settlement offered by the Department. We therefore regard the whole transaction, including the payments already made, as

relevant in determining whether further payments are necessary to give the plaintiff just compensation.

The plaintiff was paid, by the Government and by the passengers placed upon its boat at Shanghai by the Government, $2,416.40 a day for seven days, a total of $16,902.20. It was paid all the expenses in excess of normal incurred by it during the diversion. It was paid $6,366.75 for lost eastbound revenue booked at Shanghai and canceled, apparently because its boat omitted the Shanghai stop on its eastbound voyage, sailing instead directly from Manila to Japan.

The evidence is silent as to whether, after the *President Jefferson* had completed its errand for the Government and resumed its usual route, seven days behind schedule, it had all of the passengers and freight that it would have had if it had been on time, or more, or less, and if less, how much less. The only lost revenue that the evidence adverts to was that booked at Shanghai, and the Government paid for that, so that the plaintiff got the revenue without carrying the goods or passengers.

If the plaintiff's eastbound revenue was substantially normal, it had had a profitable diversion which had earned it an extra $16,902.20, including the payments already made by the Government, and the only loss which faced it was the loss incident to the disruption of its schedule. It averted that loss, except for one day, by its hurried trip across the Pacific at an extra cost of $559.39 for fuel oil and by its hurried turnaround at Seattle at an extra cost of $3,132.52 for longshoremen's overtime. In this condition of the admitted evidence, we are not informed whether the plaintiff made a profit from the Government's diversion of its ship, considering the payments already made by the Government, or suffered a loss. It would have been easy for the plaintiff to prove what its eastbound revenue was, and how it compared with its normal revenue. In the circumstances we have no reason to speculate as to whether there was a loss, and will dismiss the petition.

The Government offered in evidence itemized statements prepared by the plaintiff and submitted by it to the State Department in connection with its claim. These statements

were analyses of earnings and expenses of the *President Jefferson* on several voyages, including voyage 67, the one here in question, and voyages 65 and 66, the two preceding voyages. The plaintiff objected to their admission on the ground that "they are wholly immaterial to the issue here involved, for the reason that the testimony here shows and the petition alleges that the items which they were prepared to support have been heretofore paid by the Government and there is no dispute on those items at all, there being only a dispute as to two items with which these documents are in no way connected." Upon the plaintiff's objection, the analyses were excluded, and are not in evidence. It is now suggested that they be considered as in evidence for the purpose of showing that the plaintiff had a net operating loss on voyage 67 and is therefore entitled to more compensation than it has received.

We think their use to support the plaintiff's case after the plaintiff had caused them to be excluded, would be improper. If they had been admitted, they would, like any statement of accounts prepared by a party to a suit, have been the subject of analysis and of examination of the party which prepared them. The most casual study of them would have disclosed that the plaintiff's passenger revenues on voyages 65, 66, and 67 were, respectively, $51,629.92, $45,114.41, and $92,054.05, including, in voyage 67, the payments already made by the Government for the per diem use of the ship and for revenue lost at Shanghai. As to passenger revenue then, the plaintiff's receipts for the voyage in question were more than $40,000 in excess of and were nearly double the best of its two preceding voyages. As to freight, the receipts were, for the three voyages, $89,663, $74,205.26, and $96,102.44 respectively, so that the freight receipts were more than $6,000 in excess of the best of the two preceding voyages. The asserted operating loss resulted to a considerable extent from lower mail receipts, which were $42,662.81, $42,641.75, and $4,733.56 on the three voyages. It is fair to assume that the loss of mail receipts was not due in any degree to the fact that the vessel was diverted by the Government and put behind schedule, since the plaintiff does not even suggest any such fact. Another item contributing to the operating loss

asserted on the plaintiff's statement to the State Department was the large item for repairs charged to voyage 67. The repairs charged to voyages 65, 66, and 67 were $14,335.95, $6,552.97, and $23,473.79, respectively. But the engineer's log, which is in evidence, shows that the ship was in drydock for three days at the beginning of voyage 67, and not at all at the end of the voyage. The repairs made in drydock, which must have been major, were made weeks before the Government diverted the ship, and were in no sense a consequence of the diversion.

Even a casual examination, then, of papers not in evidence because the plaintiff succeeded in having them excluded, seems to show that the plaintiff, far from suffering a loss as a result of the Government's diversion of its ship, was benefited to the extent of several tens of thousands of dollars. If there is any burden at all on a claimant from the public funds to prove a loss in order to obtain a judgment, this plaintiff has not sustained that burden.

The plaintiff may not recover. It is so ordered.

LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

When the Government took plaintiff's vessel it impliedly agreed to pay it just compensation for its use. Just compensation consists of the reasonable hire for the use of the vessel, plus whatever damages were caused plaintiff as a result of the taking. Reasonable hire for the use of the vessel has been paid, and a part of the damages incident to the taking has been paid, but not all. The part paid is the lost revenue booked at Shanghai, which plaintiff had to cancel. This amounted to $5,740.77. But this is not all the damage suffered by plaintiff. It was necessary for the vessel to get back on schedule. In order to do this it spent, as the findings show, $555.39 for extra fuel consumed as a result of speeding up the vessel to make the crossing in 11 days instead of 12, and in the unusual overtime paid longshoremen in unloading and reloading the vessel at Seattle, as a result of which 5 days of lost time were made up. As the findings show, this amounted to $3,132.52. This money

was spent by plaintiff to regain the position in which it would have been had the taking not occurred.

The majority opinion apparently concedes that plaintiff was entitled to be paid its damages represented by lost revenue. By the same token it seems to me it is entitled to be paid the money it had to spend to get back on schedule, which, concededly, it was necessary to do in order for the vessel to earn normal profits.

The majority opinion denies plaintiff these expenses only because plaintiff did not show by how much its revenue on the homeward voyage was below normal. It seems to me, however, that this is not the test by which to determine plaintiff's right to recover. Even though plaintiff's revenue had been greater on this voyage than on other voyages, I think it would still be entitled to recover reasonable compensation for the use of its vessel, plus losses incident to its requisition, offset only by whatever advantages may have accrued to it as a result of the requisition.

All trips made by a vessel are not equally profitable. This one may have been one that would have been more profitable than others, independent of the requisition of its vessel. If so, this extra profit cannot be used to offset plaintiff's claim for just compensation. The only permissible offset is any advantage that plaintiff reaped as a result of the requisition.

The State Department recognized that plaintiff's revenues had been decreased as a result of the requisition by the lost revenue at Shanghai, and it evidently thought that the requisition had not brought it additional revenue on the homeward voyage or it would seem it would have offset one by the other. The payment of $5,740.77 was justified only on the theory that plaintiff had lost this much revenue as a result of the requisition and that it had not secured other revenue as a result of it.

The stipulation entered into between the parties shows that plaintiff furnished the State Department with various and sundry documents relating to this voyage, among which was included an "analysis of earnings and expenses of voyage." This analysis was offered in evidence by the defendant, but was excluded on the plaintiff's objection, to which the defendant took an exception. I think it should have been

received in evidence for what it was worth and should now be considered by the court.

It showed the revenue from freight, passengers, baggage, mail, bar and news, slop chest, and miscellaneous revenue. It also itemized in detail the various items of expense, some 75 in number. Apparently the State Department had before it what it thought was sufficient data from which to determine whether or not plaintiff had been able to recoup the lost Shanghai revenue by other revenue gained as a result of the requisition. Plaintiff's total gross revenue on voyage 65 was $184,578.05, on voyage 66 it was $162,521.58, and on the voyage in question (67) it was $186,584.02, which includes, of course, the $14,184.67 of revenue collected on the requisition voyage.

The analyses show a large decrease in mail revenue, some increase in revenue from freight, and a large increase in passenger revenue. Whether either the increases or the decrease was due to the requisition is not shown, and we can indulge no assumption one way or the other. The decrease was evidently not due to the requisition or the plaintiff would have shown it. If the increases were due to it the defendant must show them before it is entitled to an offset. In its exceptions to the commissioner's report and in its brief the defendant makes no such claim.

Plaintiff's petition is grounded alone on increased expenses incurred due to the requisition. It has proven to the satisfaction of the commissioner and of the court that it incurred additional expenses for fuel and longshoremen's wages. These are plainly the result of the requisition. If any savings were effected as a result of making the homeward trip in a lesser number of days the defendant does not claim it, and has not shown it. This is a matter of defense. Plaintiff's claim should not be denied because there is a possibility there might have been savings in expenses or that some of plaintiff's increased passenger and freight revenue might have been due to the requisition.

Although I do not think it material whether or not this voyage was operated at a profit or a loss, it nevertheless appears that it was operated at a loss, after taking into account the drydock charges referred to in the majority opinion.

I think plaintiff is entitled to recover these two items amounting to $3,687.91.

JONES, *Judge*, took no part in the decision of this case.

CALDWELL SUGARS, INC., v. THE UNITED STATES

[No. 45677. Decided April 3, 1944]

On the Proofs

Taxes; unjust enrichment tax; processing tax presumed to have been passed on to purchasers.—Under the provisions of the unjust enrichment tax statute (Title III of the Revenue Act of 1936; 49 Stat. 1648, 1734) it was presumed that the taxpayer had shifted to the purchasers of his product the processing tax imposed by the Agricultural Adjustment Act (48 Stat. 670); and the presumptive amount of the taxpayer's unjust enrichment, arrived at by the arbitrary computation prescribed by the statute, could be rebutted, by either the taxpayer or the Government, by the method prescribed by the statute.

Same; plaintiff's failure to produce sufficient proof to rebut statutory presumption.—Where, in the instant case, the plaintiff has undertaken the burden of proving that its abnormal profits for the period of the processing tax were due to "change in factors other than the tax;" and where the facts are stipulated; it is *held* that the plaintiff has not rebutted the statutory presumption that it shifted the burden of the tax to its purchasers except as to a portion thereof, amounting to $2,673.10.

Same; timely claim for refund; statute of limitation.—Where plaintiff made its return of unjust enrichment tax on May 15, 1937, and filed a claim for refund on June 30, 1937, asserting the unconstitutionality of the tax, which claim was rejected by the Commissioner on August 11, 1938; and where plaintiff filed a second claim for refund on December 29, 1939, being within three years from the time the return was filed, and, therefore, timely; and where this second claim for refund was rejected by the Commissioner on May 10, 1940; it is *held* that suit begun on May 5, 1942, is not barred by the statute (U. S. Code, Title 26, section 3772), since plaintiff's second claim was a claim, in the sense that plaintiff had a right to sue within two years after its rejection.

Same; failure to present evidence in claim for refund before Internal Revenue Commissioner.—Where the plaintiff did not furnish to the Commissioner of Internal Revenue, in support of its claim for refund, any evidence to show that the unjust enrichment tax should be refunded, as required by the statute and by Treasury

Regulations; it is *held* that the plaintiff is not entitled to recover even that portion of the tax which is shown, by the evidence presented, not to have been owed by plaintiff.

Same; purpose of statutory requirement of filing claim for refund before suit.—The obvious purpose of the statutory requirement of filing claims for refund with the Commissioner of Internal Revenue as a condition precedent to suit is to "afford an opportunity for administrative adjustment without suit" (*Samara v. United States*, 129 Fed. 2d,. 594, cited) and if a taxpayer may, after the Commissioner's correct and inevitable rejection of its claim on the showing made to the Commissioner, present evidence to the court which it withheld from the Commissioner, the purpose of the statutory scheme requiring that claims for refund be first made to the Commissioner is frustrated.

Same; recovery barred by failure to file claim for refund.—Where, in the preparation of the stipulation in the instant case, the plaintiff discovered, and the defendant conceded, that it had overpaid its unjust enrichment tax; recovery is barred by the fact that no claim for refund has ever been made to the Commissioner setting up this ground for refund. *United States v. Felt and Tarrant Mfg. Co.*, 283 U. S. 269.

The Reporter's statement of the case:

Mr. Carl J. Batter for the plaintiff.

Mr. J. A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

The court made special findings of fact as follows upon a stipulation:

1. Plaintiff is a Louisiana corporation organized in May 1932, with its principal office and place of business at Thibodaux, Louisiana. Plaintiff was organized for the purpose of taking over the property and business of Laurel Sugars, Inc., upon the foreclosure of a mortgage held by the Canal Bank & Trust Co. of New Orleans against the property of said Laurel Sugars, Inc. At the time of its organization, 51 percent of plaintiff's capital stock was held by the said Canal Bank & Trust Co. and the remaining 49 percent by other parties. Plaintiff, as was true of its predecessor, the Laurel Sugars, Inc., was engaged during all times pertinent hereto in growing and buying sugar cane, and proc-

essing it by the sulphitation process into refined sugar, raw sugar and blackstrap molasses. It owned and operated a plantation and factory about five miles above Thibodaux, Louisiana. It produced about 35 percent of the sugar cane which it processed, and purchased about 65 percent from growers or producers of sugar cane within a radius of fifteen miles of its plantation. Plaintiff was in competition with six other sugar mill factories operating in the same area. Prices of sugar cane, during the period the processing tax was in effect with respect to the processing of sugar cane and raw sugar under the Agricultural Adjustment Act, as amended, namely, from June 8, 1934, to and including January 6, 1936, were set by the Secretary of Agriculture. Competition between the sugar mill factories, including this plaintiff, was maintained, however, through amounts of loading and trucking fees paid to producers of sugar cane from whom they made their purchases. In Louisiana seed cane is planted in the fall of the year and the cane is harvested in the following year during October, November and December. The sugar factory of the plaintiff, as well as those of its competitors, operated only during the harvest season and was closed down until the next grinding season.

2. From 1932 to 1937, plaintiff had no sales force of its own. It sold its products through a brokerage firm in New Orleans, Louisiana, and paid a brokerage fee of 10 cents per 100 pounds. Its sales territory was limited to the Mississippi and Ohio River Valleys. Most of its sugar was sold in carload lots of 100 and 50 pound bags, largely to wholesale grocery houses, chain stores, candy manufacturers and bakeries. About one percent of its sales consisted of 25 pound bags to customers located near the factory. Plaintiff made no powdered or loaf sugar, or other specialties. Its marketing season began about the end of October and ended the following January or February, in which time about 80 to 97 percent of its sugar was sold.

3. Plaintiff's refined sugar was of an inferior grade and was sold at a differential of 20 cents to 45 cents below the current price quoted by the American Sugar Refining Company, the largest sugar refinery operating in plaintiff's trade

territory and producing standard quality refined sugar. The sale terms varied from year to year. Sales were on a so-called market move. Many of the sales were made on a four-payment plan, under which the first payment, 25 percent of the invoice, was due ten days after arrival and the remaining payment each seven days thereafter—the entire payment being due thirty-one days after arrival. Whenever plaintiff learned of an impending advance in standard prices, it informed its customers so that they could satisfy their requirements before the advance. If a customer bought during the period of an impending advance his price remained unchanged. If there was an impending decline in standard price, sales were made with a guarantee of price adjustment. The points guaranteed were less than the differential, for example, if the quoted standard price was $5.50 per 100 pounds and plaintiff's sale was at a differential of 25 points, the guarantee would be of a differential of 20 points. If the standard price declined 10 cents to $5.40 during the time of transit and before final payment, plaintiff would lower its price 5 cents—from $5.25 to $5.20. The guarantee was applicable only to installments unpaid at the time of the decline. During the sale periods of the fiscal years ended February 28, 1932, 1933, 1934, 1935, and 1936, the differential ranged from 20 to 45 points, the higher points being applicable to inferior brands of sugar. In the sale periods of the fiscal years ended February 28, 1937 and 1938, the differential was 20 points, the sugar in those years being of a better quality.

4. The Canal Bank & Trust Co. went into liquidation in May 1933 and was unable, as it theretofore had done, to make advances for production and operation in respect of the 1933 crop. Advances could not be had from any other bank or other source except a crop production agency. During a period of about four months plaintiff was unable to meet its labor pay roll and interest obligations. Its land was in poor condition because of lack of cultivation and drainage. Many of the growers of sugarcane who had formerly sold their products to plaintiff thought that plaintiff would be unable to pay, and it was difficult to get contracts for the purchase of sugarcane. In the fall of 1932,

plaintiff purchased 66,153 tons of sugarcane and in the fall of 1933 it purchased only 33,226 tons.

5. Plaintiff maintains its books and makes its income tax returns, and made its unjust enrichment tax return involved herein, on the basis of a fiscal year ending February 28th.

6. A processing tax was in effect in the United States, under the Agricultural Adjustment Act, as amended, on the processing of sugarcane and raw sugar into direct consumption sugar from June 8, 1934, to and including January 6, 1936. Plaintiff paid the processing tax imposed upon it, in respect of the processing by it of direct consumption sugar (refined sugar) from sugarcane, from the inception of the tax to and including April 30, 1935, in the amount of $28,663.55. During the period May 1, 1935, to and including January 6, 1936, plaintiff produced 70,878 one hundred (100) pound bags of refined sugar, of which total production it sold 65,102¼ bags on or before January 6, 1936. With respect to the said 65,102¼ one hundred (100) pound bags of refined sugar produced and sold by plaintiff during the period May 1, 1935, to and including January 6, 1936, the processing tax was imposed on but was not paid by plaintiff in the total amount of $34,243.77.

7. The processing tax imposed on the processing of sugar was measured at the rate of 53½ cents per 100 pounds of refined sugar (standard quality) produced; however, plaintiff's refined sugar was below the standard quality and the tax applicable to its sugar was at the rate of 52.6 cents per 100 pounds.

8. On the effective date of the processing tax with respect to sugar there was a universal increase in the price of refined sugar, standard quality, by 55 cents per 100 pounds, which, after the customary cash discount of two percent, resulted in a net increase of 53.9 cents per 100 pounds.

9. During the time the processing tax was effective plaintiff, in the sale of certain amounts of its second raw sugar to canners and manufacturers, billed the processing tax applicable thereto to the purchasers in the total amount of $3,709.00. This amount of tax was paid to the Government by plaintiff and no part of it represents tax imposed but not paid. This sugar would not have been subject to a proc-

essing tax had it not been for the fact that the customers to whom plaintiff sold the sugar used the sugar for direct consumption.

10. From early spring 1933 to June 1934, conditions in the sugar industry were uncertain and confused. In the early part of 1933 there were large excess stocks of sugar in Puerto Rico, the Philippines, Hawaii, Cuba, and the United States, and refiners, processors, and growers of beet and cane sugar of Cuba, Puerto Rico, Hawaii, the Philippines, and the United States began, under the auspices of the Department of Agriculture, to negotiate an agreement limiting the market supply in the United States in order to stabilize the price. As a result, large supplies of sugar were held in check and the price of raw and refined sugar increased steadily. The price of raw sugar at the beginning of 1933 was about $2.80 per 100 pounds and it went up to $3.65 in mid-September. During the same period, refined sugar advanced from $3.90 to $4.70. In late August or early September 1933, the growers and processors reached an agreement, but the representative of the Department of Agriculture announced that it was not satisfactory and would not have his recommendation. On October 9, 1933, the Secretary of Agriculture formally announced, after a conference with the President, that he would not sign the agreement. Consequently, all the excess supplies of sugar held in check were released. This coincided with the processing of the beet sugar crop, which produced 300,000 tons more sugar than had been produced in any year before 1933. From mid-september 1933 the price of raw sugar steadily declined, with a slight interruption in February, from a high of $3.65 per 100 pounds to $2.80, on June 7, 1934—and the price of refined sugar declined from a high of $4.70 to $4.10. There was at least 50 percent more sugar available than could be consumed in a year.

11. On February 8, 1934, the President sent a message to Congress recommending an amendment to the Agricultural Adjustment Act making sugar a basic agricultural commodity, and refined sugar prices advanced from $4.30 to $4.50. This advance held until April 18, 1934. In a press release dated March 16, 1934, the Secretary of Agriculture advocated the passage of the sugar amendment. On May 9,

1934, the Jones-Costigan amendment, which made sugar a basic agricultural commodity, was approved by the President, and it became effective June 8, 1934.

12. Unusually large stocks of sugar moved into the hands of retailers and customers during the thirty days preceding the effective date of the tax. For several months prior to the effective date of the act, the price of refined sugar fluctuated, reaching $4.50 on February 11, 1934, just after the President's message was delivered. On June 7, 1934, the day before the taxes became effective, the price was $4.10 per 100 pounds. During the same period, the price of raw sugar also varied widely, being $3.42 on February 11, and $2.80 on June 7, 1934.

13. During the time the processing tax was effective, two reductions were made in the tariff on off-shore raw sugar from certain foreign countries. After the decision on January 6, 1936, in *United States* v. *Butler, et al.* 297 U. S. 1, the Secretary of Agriculture announced that in his opinion all the provisions of the act applicable to sugar, except the processing tax, remained in effect. The system of quota control remained in effect throughout the marketing period of the 1935 and 1936 crops.

14. Raw and refined sugar prices from the first of the year 1933 to June 8, 1934, were determined by a number of factors. In the beginning of 1933 there were large excess stocks of raw and refined sugar and by all ordinary rules the prices of raw and refined sugar should have been very low. Probably the only thing that kept the price from going very low was the feeling that the new Administration's efforts to increase commodity prices in general would be successful. Other factors were the negotiations to reach a stabilization agreement, the agreement itself, and the disapproval of such agreement by the Secretary of Agriculture.

15. Plaintiff made no refund of tax to its vendees after the tax was invalidated January 6, 1936, or at any other time.

16. No payments were made by the Secretary of Agriculture to any grower of sugar cane under section 8 of the Agricultural Adjustment Act, as amended. (48 Stat. 675; U. S. Code, Title 7, section 615 (f).)

17. Plaintiff sold substantially all of its granulated sugar during a four month period in each year, during the months of November to the succeeding February. The percentages of sales of granulated sugar for each of the said four month periods to the total sales during the following fiscal years are:

Feb. 28, 1933	87.96%
Feb. 28, 1934	100.00%
Feb. 28, 1936	99.61%
Feb. 28, 1937	98.21%

18. The four month period, November to February, inclusive, normally is a period of seasonal declines.

The price movement of refined sugar, stated at semimonthly intervals per hundred pounds, for each of the fiscal years, follows:

	2/28/33	2/28/34	2/28/36	2/28/37
November 1	4.25	4.60	5.30	4.50
November 16	4.25	4.50	5.30	4.80
December 1	4.15	4.50	5.10	4.80
December 16	4.15	4.40	4.90	4.80
January 1	4.15	4.30	5.00	4.60
January 16	3.95	4.30	4.75	5.00
February 1	3.90	4.30	4.65	5.00
February 16	3.90	4.50	4.65	5.00

19. The price movement of refined sugar following February 28, 1936, was as follows:

March 3rd and 4th	$4.55
March 5th to 10th	4.65
March 11th to 24th	4.75
March 18th to 20th	4.85
March 31st to July 9th	5.00
July 10th to August 23rd	4.75
August 24th to September 14th	4.65
September 15th to September 27th	4.75
September 28th to October 12th	4.72
October 13th to October 15th	4.62
October 19th to October 22nd	4.75
October 23rd to October 29th	4.40
October 30th and 31st	4.50

20. The quota for 1934 under Section 8 (a) of the Agricultural Adjustment Act was announced on June 12, 1934, as 6,476,000 short tons and the allotment for the Philippine Islands was filled on June 30, 1934; for Puerto Rico on

November 20, 1934; for Hawaii on November 30, 1934; and for Cuba on December 18, 1934.

21. The quota for 1935 was announced on January 8, 1935, as 6,359,261 short tons. The allotment for Cuba was filled on August 19, 1935.

22. On October 19, 1935, the Secretary of Agriculture announced that, under restrictions, over quota sugar could be withdrawn from bond and processed. In December 1935, 127,574 tons of sugar were so withdrawn.

23. On June 30, 1937, plaintiff filed a claim for refund (Form 843) for the refund of $23,989.93 assessed against and paid by it as unjust enrichment tax for the fiscal year ended February 28, 1936. The ground upon which this claim was based was as follows:

> That the law, Regulations 95, under Title 3 of the Revenue Act of 1936, under which this tax was paid is unconstitutional and taxpayer is entitled to refund of the amount of tax ($23,291.20) and interest ($698.73) paid.

No facts in support of this claim for refund were submitted to the Commissioner of Internal Revenue by plaintiff prior to its disallowance or at any time subsequent thereto. By registered letter dated August 11, 1938, the claim was disallowed by the Commissioner of Internal Revenue to the extent that refunds had not been allowed with respect thereto as set forth in paragraphs 3 (d) (e) and (f) of the petition herein. Prior to the disallowance of the claim for refund, in a letter dated April 21, 1938, advising plaintiff that an overassessment of unjust enrichment tax for the taxable year in the amount of $1,347.54 had been allowed and would be refunded, the Commissioner of Internal Revenue stated in respect of the ground for refund set forth in the claim that it was not within his jurisdiction to pass upon the constitutionality of Federal tax statutes duly enacted by Congress. The overassessments allowed and the refunds made, as set forth in paragraphs 3 (d) (e) and (f) of the petition, were the result of an investigation of plaintiff's unjust enrichment tax return filed May 15, 1937, as shown above, involving an examination of the plaintiff's books and records.

24. December 29, 1939, plaintiff filed a second claim for refund (Form 843) for the refund of the unjust enrichment taxes involved in the first claim for refund filed by plaintiff on June 30, 1937, as aforesaid, and which was likewise in the amount of $23,989.93. This second claim was based upon the following grounds:

> 1. Said taxing statute, Title III of the Revenue Act of 1936, Sections 501–506, is in violation of the Constitution of the United States in that:
> (a) The said statute does not meet the requirements of Amendment XVI to the Constitution of the United States.
> (b) Said Statute makes an arbitrary and unreasonable classification with respect to the income subject to the tax and the rate of the tax applicable to such income.
> (c) Said levy or so-called tax is not in fact a tax but a penalty, and the same being retroactive is null and void.
> (d) Said so-called tax is arbitrary and unreasonable both as to the basis of the tax and its mode of computation.
> (e) Said Statute deprives claimant of its property without due process of law and for public use without just compensation in violation of Amendment V to the Constitution of the United States.
> 2. Claimant did not pass the tax on to others, directly or indirectly; but bore the burden thereof; and data in support of this fact is in course of preparation and will be submitted in due course.

By registered letter dated May 10, 1940, plaintiff's second claim for refund was disallowed in full by the Commissioner of Internal Revenue. The Commissioner again advised plaintiff in his letter of disallowance that it was not within his jurisdiction to pass upon the constitutionality of Federal tax statutes duly enacted by Congress. No facts were submitted by plaintiff to the Commissioner of Internal Revenue in support of its second claim for refund prior to its disallowance; although, subsequent thereto on November 5, 1940, the plaintiff in part I of its protest requested that the unjust enrichment tax be determined in conjunction with the Processing Tax claim for refund under Title VII, as provided by Section 506 of the Revenue Act of 1936. Parts II, III, and IV of the protest were never filed with the Commissioner of Internal Revenue, but a trial of the Process-

ing Tax claim for refund has been had before The Tax Court of the United States.

25. On May 15, 1937, plaintiff filed with the Collector of Internal Revenue for the District of Louisiana a return on Form 945 of tax on unjust enrichment imposed under Title III of the Revenue Act of 1936, 49 Stat. 1734–39 (U. S. C. 1940 ed., title 26, secs. 700–706.) That return disclosed a net taxable income under the provisions of Section 501 (a) (1) of the statute of $35,826.37, in respect of which plaintiff paid an unjust enrichment tax to the Collector of Internal Revenue in the amount of $23,291.20 and interest thereon in the amount of $698.73, as alleged in paragraphs 3 (a) and (b) of the petition. The following statements are correct, except as shown in finding 27, and were set forth in that return:

(1) The plaintiff's net income for the entire taxable year (March 1, 1935, to and including February 28, 1936), from the sale of sugar products with respect to which a processing tax was imposed and paid, and imposed and not paid, amounted to $68,785.45.

(2) The plaintiff's net income from the sale of sugar products with respect to which a processing tax was imposed on but not paid by it amounted to $59,646.83.

(3) The plaintiff's net income, presumed to be attributable to shifting to others the burden of the processing tax imposed on but not paid by it, computed in accordance with section 501 (e) (1) of the statute, amounts to $53,558.99.

26. Since plaintiff was in business only two years prior to the imposition of the processing tax with respect to the processing of sugar, the computation set forth in the return of the extent to which plaintiff is presumed to have shifted to others the burden of the processing tax imposed on but not paid by it was made on the basis of a two-year base period and not the six-year base period provided by section 501 (f) (1) of the statute. The two-year period prior to the imposition of the processing tax used in the return for the purpose of computing the net income presumed to be attributable to shifting the imposed but not paid tax to others furnishes a sufficient base period for the margin comparison and the full six-year base period is not necessary for that purpose.

27. The amount of unjust enrichment tax paid by plaintiff was calculated on the basis of the amount of processing tax imposed on but not paid by it for the taxable year involved, all other bases for determination of net income under the statute being greater than the amount of tax imposed but not paid. In setting out in its return the amount of tax imposed but not paid, plaintiff in its calculations of production subject to tax overstated the amount by $1,582.60, resulting in an overpayment of tax in the amount of $1,266.08, no part of which has been refunded to plaintiff. This matter of the overstatement of plaintiff's net income subject to unjust enrichment tax was first brought to the attention of the Government during the course of the conferences which resulted in the stipulation made by the parties in this suit, and was not known to the Commissioner of Internal Revenue at the time of his disallowance of either the first or the second claim for refund involved herein.

28. The profits of plaintiff from its entire business during the respective fiscal years ending on February 28th, and a segregation of such profits to refined sugar follows in total dollars and cents per pound of refined sugar:

	1933	1934	Total, 1933–34	1936	1937
Total Profits:					
Profits				$121, 116. 13	$168, 651. 99
Losses	$739. 85	$1, 316. 74	$2, 056. 59		
Profits on Refined Sugar:					
Dollars	$18, 148. 13	$6, 701. 30	$24, 849. 43	$85, 898. 06	$94, 217. 29
Cents per pounds	.00316	.001683	.002555	.011634	.010109

29. The selling price of refined sugar during the fiscal year ended February 29, 1936, exceeded the average selling price for the years 1933 and 1934 by $0.006052 per pound. This increase on the quantity sold during that fiscal year amounts to $44,682.77.

30. The selling price of refined sugar during the fiscal year ended February 28, 1937, exceeded the average selling price for the years 1933 and 1934 by $0.005548 per pound.

31. The cost of processing sugar cane during the fiscal year ended February 29, 1936, was $0.00077 per pound less than the average processing cost for the years 1933 and 1934.

The decrease in cost of processing applied to the number of pounds processed in the said fiscal year amounts to $5,685.00. The quantity of cane processed in that fiscal year was 25.66 per cent more than the average for each of the years 1933 and 1934.

32. The cost of sugar cane for the fiscal year ended February 29, 1936, was $0.000807 less than the average cost for the years 1933 and 1934. The reduction in cost per pound applied to the quantity of cane involved amounts to $5,961.74; and is the net of an increased cost of cane purchased of $6,109.56 and a decreased cost of cane grown by plaintiff of $12,071.30.

33. The sugar cane processed during the fiscal year ended February 29, 1936, yielded 9.686 pounds of sugar more per ton than the cane processed during the years 1933 and 1934. The value of such increased extraction is $10,341.67.

34. The total of all sums paid to the Collector of Internal Revenue, as set forth above with respect to paragraphs 3 (a) and 3 (b) of the petition, were thereafter by the Collector of Internal Revenue turned over to and deposited in the Treasury of the United States in the usual course of the Collector's business.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover $22,392.44 paid as unjust enrichment taxes under Title III of the Revenue Act of 1936 (49 Stat. 1734–39) for its fiscal year ending February 28, 1936. The history of its claim is as follows. The Agricultural Adjustment Act as amended (48 Stat. 670), imposed a processing tax on the first domestic processing after June 7, 1934, of sugar cane into direct-consumption sugar. The plaintiff was engaged in that kind of processing, and for the first processing season, that is, until April 30, 1935, it paid the processing tax. After the seasonal shut-down it resumed processing in October 1935, but did not pay the tax on that processing.

On January 6, 1936, the Supreme Court of the United States, in the case of *United States* v. *Butler*, 297 U. S. 1, held

that the taxing provisions of the Agricultural Adjustment Act were unconstitutional. The taxes which would have been due, but which the plaintiff did not pay, on the 65,102¼ one hundred pound units of sugar which it processed from October 1935 to January 6, 1936, amounted to $34,243.77.

Because many processors had shifted the tax by adding it to the price of sugar sold, or by other means, Congress thought that a good deal of unjust enrichment had resulted from the imposition and invalidation of the processing tax, so it, in Title III, Section 501 (a) (1) of the Revenue Act of 1936 (49 Stat. 1734) imposed an 80% tax on abnormal income derived from the sale of commodities to which the processing tax had been applicable, with a limitation that the new tax should not exceed the unpaid processing tax. Since the taxpayer's net income and excess profits had been enlarged by his escape from the processing tax, and his taxes on income and profits had been accordingly increased, he was given credit for those increases, against the unjust enrichment tax. Section 502. The plaintiff filed a return on this tax on May 15, 1937, and, after the correction by the Commissioner of Internal Revenue of some of the plaintiff's computations, paid $22,392.44 of tax and interest. It seeks in this suit to recover that amount.

The unjust enrichment tax statute provided in Section 501 (e) a method of determining, *prima facie*, whether a processor had shifted the burden of the processing tax to others, and thereby enriched himself. The method was to compare his profit, per unit of the processed article, during the period that the tax was in effect, with his profit during a period of years before that period. The application of that method to the plaintiff's situation showed a profit of $53,-558.99 in excess of normal. But since the unjust enrichment tax was limited, at the outside, to the amount of the processing tax unpaid, which as we have said, was $34,243.77, the latter sum, less the credits for enlarged income and excess profits taxes, was the presumptive amount of the unjust enrichment tax.

Section 501 (i) provided that the presumptive amount of the taxpayer's unjust enrichment, arrived at by the arbitrary computation prescribed by the statute, could be rebutted, by either the taxpayer or the Government,

> * * * by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax [the processing tax]. Such proof may include, but shall not be limited to:
>
> (1) Proof that the change or lack of change in the margin was due to change in factors other than the tax. * * *

The plaintiff in this case has undertaken the burden of proving that its abnormal profits for the period of the processing tax were due to "change in factors other than the tax." The facts are stipulated. They show that on the date that the processing tax became effective, June 8, 1934, there was a universal increase in the selling price of refined sugar, standard quality, of 55 cents per 100 pounds, which, less the customary 2% discount for cash, was a net increase of 53.9 cents; that the processing tax on such sugar was 53.5 cents; that the tax on the plaintiff's sugar, which was below standard in quality was 52.6 cents; that the plaintiff's sugar was sold during, as well as before and after, the processing tax period, at a differential of 20 to 45 cents below the current price quoted by the American Sugar Refining Company, a processor of standard grade sugar; that the plaintiff billed the processing tax separately to some purchasers from it, and received $3,709 in payment of those bills, which amount was paid to the Government and is not in issue in this case; that the plaintiff, during the period of the processing tax, effected savings of $5,685 in the cost of processing, $5,961.74 in the decreased cost of cane, not caused by shifting the tax backward to the producer, but by producing cane more cheaply from its own plantations, and $10,341.67 in the increased yield of sugar from the amount of cane used; that the sum of these three items of savings is $21,988.41; that when this sum is subtracted from $53,558.99, the amount of the plaintiff's abnormal profit for the tax period, it leaves $31,570.58, to be accounted for by reason of increases in the selling price of sugar during the tax period over the prices in the base or test period; that this amount is $2,673.19 less than $34,243.77, the amount of the processing tax imposed but not paid; that the selling price of sugar fluctuated considerably before the imposition and after the invalidation of the tax, principally in response to the ap-

parent prospects, from time to time, of the Government's making some move to stabilize the sugar market.

On these facts, the plaintiff has not rebutted the statutory presumption that it shifted the burden of the tax to its purchasers, except as to $2,673.19. After proving its savings of $21,988.41 resulting from conditions not related to the price at which it sold its sugar, it still had $31,570.58 of the abnormal profits attributable to selling its sugar on a larger margin than normal above the cost of production. The plaintiff has not explained why it would have been able to sell on this larger margin if the price of sugar had not been increased to the purchaser at the time of and because of the processing tax. It has not, therefore, sustained its burden of proof except as to $2,673.19.

The Government urges that all of the plaintiff's claim is barred by its failure to make proper claims for refund. We now consider the steps which the plaintiff took to recover its tax, before it filed its suit in this court.

It made its return of unjust enrichment tax on May 15, 1937. It filed a claim for refund on June 30, 1937, asserting the unconstitutionality of the tax. This claim was disallowed by registered letter on August 11, 1938. It filed a second claim for refund on December 29, 1939. This claim was timely, being within three years from the time the return was filed. Section 322 (b) (1) of the Revenue Act of 1936. It repeated the assertion of unconstitutionality, and stated in a second paragraph

> 2. Claimant did not pass the tax on to others, directly or indirectly; but bore the burden thereof; and, data in support of this fact is in course of preparation and will be submitted in due course.

What the plaintiff evidently meant was that it had not passed the *processing tax* on to others, and that therefore it did not owe the unjust enrichment tax which it had paid and was seeking to get back. In spite of the ineptness of its statement, which is substantially repeated in paragraph six of its petition, we suppose the taxing authorities understood, as we understand, what the plaintiff was trying to say. The plaintiff submitted no data in support of this claim for refund, though it said in its claim that it would do so.

Section 3772 of the Internal Revenue Code provides that no suit in court for the recovery of internal revenue taxes shall be maintained until

> a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Treasury Regulations 95, relative to the tax on unjust enrichment, make applicable, *inter alia*, Supplement O to Treasury Regulations 94, which contains in Article 322-3 the following requirement:

> The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. * * *

* * * * *

The Government seems to contend that the claim of December 29, 1939, was a nullity because it did not set forth "facts sufficient to apprise the Commissioner of the exact basis thereof." Therefore, the Government contends, the only valid claim for refund was the one filed on June 30, 1937, and disallowed on August 11, 1938, hence this suit, begun on May 5, 1942, was too late, since it was begun more than two years after the rejection of the claim. Section 3772 (a) (2) of the Internal Revenue Code. If we agreed with the Government that the first claim was the only effective claim filed, this suit would fail on the merits, as well as by lapse of time, since the only ground asserted in the first claim was the unconstitutionality of the unjust enrichment tax, which ground is not relied on in this suit.

We think, with some doubt, that the plaintiff's second claim for refund was a claim, in the sense that the plaintiff had a right to sue within two years after its rejection on May 10, 1940. But, because of what we are about to say, the plaintiff's position is not improved by our conclusion on that point. As

we have said, the plaintiff did not furnish to the Commissioner of Internal Revenue any evidence whatever tending to show that the tax should be refunded. If the plaintiff may, after the Commissioner's correct and inevitable rejection of its claim on the basis of the showing made to the Commissioner, present evidence to the court which it withheld from the Commissioner, and win its suit in court, the purpose of the statutory scheme requiring that claims for refund be first made to the Commissioner is frustrated. The Government would save interest if it permitted the taxpayer to sue in court without the gesture of filing with the Commissioner an unsupported claim calling for rejection. The obvious purpose of the statutory requirement of filing claims for refund with the Commissioner as a condition precedent to suit is to "afford an opportunity for administrative adjustment without suit." *Samara* v. *United States*, 2 Cir. 129 F. 2d, 594. No such opportunity was afforded by what the plaintiff filed with the Commissioner, and the condition precedent was not fulfilled. The plaintiff may not, therefore, recover even that portion of the tax which is shown, by its evidence here presented, not to have been owed by it.

While preparing the stipulation in this case, the plaintiff discovered, and the defendant concedes, that it had overpaid its tax by $1,266.08 because in its return it had overstated the quantity of sugar on which a processing tax had been imposed but not paid. Recovery of this sum is barred, of course, by the fact that no claim for refund has ever been made to the Commissioner setting up this ground for refund. Section 3772, Internal Revenue Code. *United States* v. *Felt and Tarrant Mfg. Co.* 283 U. S. 269.

The plaintiff is not entitled to recover. Its petition is therefore dismissed.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

W. H. HARRISON COMPANY, INC. v. THE UNITED STATES

[No. 45746. Decided April 3, 1944]

On the Proofs

Fraud under section 1086 of Revised Statutes; vouchers containing minor discrepancies where no intention to defraud is shown.—Where plaintiff, for produce sold to the Government, signed vouchers prepared by the Government's representatives which contained minor discrepancies as to items sold and as to amounts due therefor but which were substantially correct as to total amounts due; and where the proof fails to show that there was any fraud intended or practiced on the part of the plaintiff, or any collusion with the Government's purchasing agent to defraud the Government; it is *held* that plaintiff's action with respect to such vouchers does not come within the provisions of section 1086 of the Revised Statutes. *Crovo* v. *United States*, 100 C. Cls. 368, cited.

The Reporter's statement of the case:

Mr. Harry D. Ruddiman for plaintiff. *Messrs. George R. Shields* and *Joseph R. Sherier*, and *King & King* were on the brief.

Mr. D. B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the District of Columbia, and is engaged in the business of selling produce on a commission basis.

2. During the period July 7, 1936, through January 28, 1937, defendant, acting through the Veterans' Administration Facility, in Washington, D. C., made open market purchases of produce from plaintiff, confirmed by written purchase orders, totalling $309.44. Plaintiff delivered the produce covered by such purchases, demanded payment, but has not been paid therefor.

3. During the period May 7, 1940, through May 21, 1940, defendant, acting through the Bureau of Dairy Industry, Department of Agriculture, made open market purchases of produce from plaintiff, confirmed by written purchase or-

ders, totalling $15.50. Plaintiff delivered the produce covered by such purchases, demanded payment, but has not been paid therefor.

4. During the period November 18, 1941, through December 10, 1941, defendant, acting through the War Department, made open market purchases of produce from plaintiff, confirmed by written purchase orders, totalling $1,739.60. Plaintiff delivered the produce covered by these purchase orders, demanded payment, but has never been paid therefor.

Defendant's Counterclaim

5. During the years 1933, 1934, and 1935, plaintiff was engaged in the business of selling produce on a commission basis. Plaintiff received the produce from shippers, priced it, sold it, took out its commissions, and remitted the balance to the shippers.

6. Plaintiff, during the period March 1933 to April 1935, made numerous sales of produce to the U. S. Marine Barracks Commissary, Quantico, Virginia. The procedure followed in making these sales was as follows:

The commissary buyer obtained prices from the various dealers, and if he decided to buy from plaintiff he sent a truck to plaintiff's establishment. Plaintiff delivered the commodities to the truck, at the same time making out a sales ticket showing a list of the commodities sold, the prices, and the total price. Plaintiff retained the original and gave a copy of the sales ticket to the noncommissioned officer or enlisted man in charge of the truck. The sales slips were initialed by such noncommissioned officer or enlisted man.

The total sales thus made to defendant during the period March 1933 to April 1935 amounted to $6,258.03. The prices listed on the sales slips for the various commodities represented the fair market value of such commodities at the time they were sold.

7. Several days after delivery of the commodities listed in a sale to defendant the commissary officer at Quantico, Virginia, sent to plaintiff for certification a voucher representing such sale. This voucher was usually brought by a

noncommissioned officer in charge of a truck when he came for another purchase of commodities. The voucher was delivered to the bookkeeper in plaintiff's bookkeeping department. The voucher was prepared by Captain Radcliffe, defendant's commissary officer, or a subordinate in his office at Quantico, and contained itemization of the commodity, quantity, unit price, and total amount. Plaintiff's bookkeeper did not check the list of commodities in the voucher with those listed on the sales slip, which was in the file, except in one instance, referred to in Finding 8, but did check the total of the voucher with the total of the sales slip, the correct amount of which had been posted to the ledger sheet, and if the amounts were substantially the same, the voucher was approved and signed by the credit manager or the bookkeeper.

The voucher approved by plaintiff's bookkeeper contained the following certificate:

> I certify that the above bill is correct and just, and that payment therefor has not been received.

When plaintiff's bookkeeper had approved the vouchers, the noncommissioned officer or enlisted man in charge of the truck took them back to the Marine Barracks at Quantico, Virginia. Captain Radcliffe then certified the vouchers, the certificate reading as follows:

> I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the services performed as stated; that they were procured under the contract numbered above, or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No. 2 of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

The vouchers were then submitted to defendant's disbursing officer at the Marine Barracks for payment, and that officer put the voucher in line for payment. The disbursing officer paid plaintiff the amounts shown on the vouchers.

8. In the only instance in which plaintiff's credit manager checked the voucher against the sales slip, he noticed that there was a commodity shown on the voucher that was not listed on the sales slip. The totals of the voucher and of the sales slip agreed, and he concluded that it was a clerical error, and did nothing about correcting it. In the instances where the voucher totals and ledger totals varied, the bookkeeper or credit manager signed the vouchers and did not send them back for correction because of the red tape of straightening them out, and because the small variations were sometimes in favor of plaintiff and sometimes in favor of the defendant.

9. There were 153 vouchers thus prepared during the period referred to, 148 of which formed the basis of defendant's counterclaim. Except in five instances, each of the vouchers contained some discrepancy as to commodity, unit price, or quantity in comparison with the original corresponding sales slips. Of the remaining 148 vouchers, 69 correctly stated the amount of the sales which they purported to cover. The remaining 79 vouchers varied in amounts, sometimes in defendant's favor and sometimes in plaintiff's favor, when compared with the amounts shown on the corresponding sales slips submitted by plaintiff.

The net discrepancy between the total of the 148 vouchers, $6,263.72, and the total of the sales slips, $6,258.03, is the sum of $5.69.

The variations in amounts on the 79 vouchers are as follows:

One overpayment	$5.25.
Two overpayments	$3.04 & $3.07.
Three overpayments between	$2.26 & $2.55.
Four overpayments between	$1.00 & $1.51.
Five overpayments between	50¢ & 86¢.
Thirty-three overpayments between	1¢ & 38¢.
One underpayment	$5.93.
Four underpayments between	$2.25 & $3.00.
Two underpayments	$1.19 & $1.50.
Twenty-four from	1¢ to 99¢.

In addition to the 148 vouchers, the basis of defendant's counterclaim, five vouchers check with the sales tickets in all respects.

10. Plaintiff did not know or suspect at the time the 148 vouchers were certified that Captain Radcliffe or anyone in his office engaged in the practice of listing on the vouchers articles or commodities which differed from those shown on the corresponding sales slips.

11. About July 30, 1935, the General Accounting Office made an investigation of the vouchers set forth in defendant's counterclaim. Plaintiff cooperated with the investigators in making its records available to them.

12. The proof fails to show that there was any fraud on the part of plaintiff or any collusion by it in connection with the actions of the contracting officer.

The court decided that the plaintiff was entitled to recover and that the defendant was not entitled to recover on its counterclaim, which was dismissed.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues for $2,081.54, the purchase price of certain fruits and vegetables sold the defendant during three periods between July 7, 1936 and December 10, 1941.

The defendant defends solely on the ground that the plaintiff had submitted false vouchers in connection with former sales of products to it during the period between March 2, 1933 and March 30, 1935. It claims the right under section 1086 of the Revised Statutes to offset against plaintiff's present demand the amount paid on these former vouchers.

The same issue was presented to us in the case of *Frank B. Crovo, Jr., et al.* v. *United States*, 100 C. Cls. 368. That case came before us on plaintiff's demurrer to defendant's plea of set-off, which was substantially the same plea as that interposed in this case. These pleas allege that in the former vouchers plaintiffs had knowingly "misstated" the particular items sold and the total price of them and that this had "facilitated" certain defalcations of a Captain Radcliffe. On account thereof the defendant insists that this former claim was forfeited to the United States under the above-mentioned section and that it has the right to offset the amount paid thereon against plaintiff's present claim.

In the *Crovo* case we held, first, that inasmuch as the plea did not allege that the "misstatements" had been made for the purpose of securing payment of the claim, that the case did not come within the provisions of section 1086 of the Revised Statutes; and we held, second, since there was no showing of any pecuniary loss in the former transaction, that the amount paid on the alleged false vouchers could not be set-off against plaintiff's present claim.

The present case was heard by a commissioner, who has made findings of fact. His final finding is:

> The proof fails to show that there was any fraud on the part of plaintiff or any collusion by it in connection with the actions of the contracting officer.

We have carefully examined the testimony; it amply supports this finding.

The proof shows that trucks, ordinarily in charge of a non-commissioned officer, from the Marine Barracks at Quantico, Virginia, came to plaintiff's place of business in Washington and purchased fruits and vegetables. Sales slips were made out by the plaintiff and signed by the non-commissioned officer in charge. The signed copy was kept by plaintiff and the duplicate was turned over to the non-commissioned officer. Later a voucher was prepared by the commissary officer at the Marine Barracks and sent to plaintiff for its signature. Ordinarily these vouchers were presented to plaintiff when the truck came in to make another purchase of fruits and vegetables. Plaintiff checked the amount of the voucher against the amount shown to be due on their ledger. If it was substantially correct, it was signed. If there was a variance of a few cents between the amount shown on the voucher and the amount shown on the ledger it was signed nevertheless, to avoid the red-tape incident to sending it back for correction.

The defendant introduced as exhibit No. 4, "Excerpts from Investigation Report of Norman E. Simpson, Senior Investigator, General Accounting Office, No. A–31231, dated January 23, 1936." This shows that in 49 of the vouchers there were discrepancies varying from one cent to twenty cents, sometimes an overpayment, and sometimes an under-

payment. The largest overpayment was one of $5.25, accounted for by the failure to allow a credit for some goods returned. Other discrepancies are accounted for by an underpayment on a previous voucher which was compensated for by an overpayment on a succeeding voucher. For instance, on October 6, 1933, there was an underpayment of $2.25. The following voucher of October 12 showed an overpayment of $2.26. During the period from March 2, 1933 to March 30, 1935, more than two years, during which there were 153 different sales amounting to a total of $6,258.03, there were net overpayments of $5.69, principally accounted for by the failure to take into account the above-mentioned credit.

The testimony wholly fails to convince that there was any intention on the part of plaintiff to practice a fraud on the defendant by exacting from it more money than was due. Slight errors in amounts were made, but they were made by the defendant's own officer who prepared the voucher, and were mere bagatelles.

The defendant's chief reliance, however, is not on the fact that more was paid on the vouchers than was due, but rather on the fact that the items listed on the vouchers sometimes were not the items actually sold; but defendant has wholly failed to prove that plaintiff, when it signed the vouchers, knew of these discrepancies. Fendrich, plaintiff's office and credit manager, who signed many of the vouchers, definitely denies knowledge of them, except in one instance. Defendant's only testimony that plaintiff knew of these discrepancies at the time the vouchers were signed was the testimony of Investigator Simpson, of the General Accounting Office, who said he had a conversation with some unidentified employee of the plaintiff, who, he says, admitted he knew that the items listed were not correct, but said he did not think it made any difference. Mr. Simpson testified eight years after he made his investigation. He made no record of this conversation and did not include it in his report. Who the employee was, he does not know, but thinks it was Mr. Fendrich, who, as stated above, expressly denies that he had any knowledge of the discrepancies at the time he signed any of the

vouchers, except in one instance. Simpson's testimony is not convincing.

As the testimony shows, plaintiff was not interested in determining whether or not the exact items sold had been correctly listed, but only in determining whether or not the vouchers called for the correct amount due. Certainly there is no proof that plaintiff's purpose in signing a voucher which incorrectly listed the items sold was to practice a fraud on the defendant. Defendant has wholly failed to make out a case coming within section 1086 of Revised Statutes and, therefore, it is not entitled to the offset claimed. Its amended counterclaim is dismissed.

Plaintiff has established its demand to the extent of $2,064.54. On the former vouchers plaintiff was overpaid the sum of $5.69, leaving a net amount due of $2,058.85. Judgment therefor will be entered in favor of plaintiff and against the defendant. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

LENARD O. REICHEL v. THE UNITED STATES

[No. 45440. Decided April 5, 1943]

On the Proofs

Pay and allowances; Navy officer, bachelor, with dependent mother.—It is *held* that plaintiff, a bachelor officer in U. S. Navy, with dependent mother, is entitled to recover increased rental and subsistence allowances for the period from June 1, 1939, to May 10, 1941, where it is not disputed he was his mother's chief support during such period, and until his marriage.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff's claim is made under the Act of June 10, 1922, 42 Stat. 625, as amended by the Act of May 31, 1924, 43 Stat. 250, for increased rental and subsistence allowances on account of a dependent mother from June 1, 1939 to May 10, 1941.

Plaintiff enlisted in the United States Navy on November 21, 1933, and was discharged on July 8, 1935 in order to enter the Naval Academy. He was appointed Midshipman on July 9, 1935, was commissioned Ensign from June 1, 1939, and is now serving on active duty under that appointment. He was a bachelor officer until his marriage on May 10, 1941.

2. Plaintiff's mother, Mrs. Ruth Reichel Barnett, was divorced from his father in June 1925. At that time she received a lump sum payment of $1,500 from her former husband and was awarded the sum of $12 per week for the support of her two minor children, but she received only three of the weekly payments. Plaintiff's father died on August 9, 1925, without leaving any property, but in 1927 the mother received $305 from the Veterans' Administration, representing the amount of premiums paid upon a policy of Government life insurance which plaintiff's father had allowed to expire before his death.

3. Plaintiff's mother married again in September 1926, but separated from her second husband in 1928 and obtained a divorce from him in 1931. She has received no alimony or other contributions of any kind toward her support from her second husband since 1928. The mother is fifty years of age and during the period of this claim she owned no real or other income-producing property.

After the separation from her second husband she supported herself and two children until the summer of 1936 when she was compelled to discontinue working because of heart trouble. She was employed for a short time in 1938 but was forced to cease working entirely after a few months on account of her health.

4. From June 1, 1939 to September 15, 1939, the mother and her younger son, Fred Reichel, lived with her sister in

Paw Paw, Michigan. Then they moved to Kalamazoo, Michigan, where the younger son attended college, and remained until June 1940, when they returned to the home of her sister in Paw Paw, Michigan.

On October 7, 1940, plaintiff's mother and her younger son moved to California in order to be with plaintiff whose ship was then on the West Coast. She and her son, Fred, continued to live together in California until December 1940, when he enlisted in the United States Army as a private. The mother lived alone in California for the remainder of the time covered by the claim.

5. While the mother and her youngest son resided in the home of her sister from June 1, 1939 to September 15, 1939, and during the summer of 1940, she paid her sister $10 per month as rent, $1.50 per month for gas and electrical bills, and $0.50 per month for water. Food for the mother and her son cost between $0.75 and $1.00 per day.

During their residence in Kalamazoo, Michigan, for the school year 1939–1940, she and her son, Fred, lived in a room which they rented for $27 per month. Their food cost $1.00 per day. The mother had doctor bills amounting to $3.00 or $4.00 per month. Her clothing cost from $3.00 to $3.50 per month, and they spent approximately $2.00 per month for incidental expenses.

While she resided in California, the mother spent $24.00 per month for rent, $18.00 per month for food, and approximately $0.75 per month for recreation and incidental expenses.

6. During the school year 1939–1940 and the following summer, plaintiff's younger brother, Fred Reichel, had part-time employment with the Atlantic & Pacific Tea Company from which he earned $10.00 to $13.00 per week. From this income, he paid his school and personal expenses and paid his mother from $3.00 to $4.00 per week for his room and board. Since he entered the army as a private in December 1940, he has contributed the sum of $5.00 per month toward his mother's support.

7. Plaintiff sent his mother $50.00 when he graduated from the Naval Academy in June 1939 and has allotted

$50.00 per month out of his pay to her since August 1939. The amounts which plaintiff has contributed to his mother's support have constituted her sole source of income since June 1939, with the exception of the $3.00 or $4.00 paid weekly by her younger son for his room and board while he lived with her and the $5.00 which he has contributed monthly since his enlistment in the army. Plaintiff's mother has been dependent upon plaintiff for her chief support during the entire period of the claim.

8. Plaintiff's claim was presented to and disallowed by the General Accounting Office. Plaintiff is entitled to increased rental and subsistence allowances on account of a dependent mother for the period from June 1, 1939 to May 10, 1941. He is due the sum of $849.33, representing said allowances for an officer of his rank and length of service for the period from June 1, 1939, to March 31, 1941, the date of the last available pay account on file in the office of the Comptroller General. However, his claim continues to May 10, 1941, the date of his marriage.

The court decided, in an opinion *per curiam*, as follows, that the plaintiff was entitled to recover:

It is clear that plaintiff was his mother's chief support for the period of his claim. The defendant does not deny it. Why his claim was denied by the General Accounting Office does not appear. No reason therefor can be found in the evidence. Plaintiff is entitled to recover.

Entry of judgment will be suspended until the incoming of a report from the General Accounting Office showing the amount due from June 1, 1939 to May 10, 1941, in accordance with the foregoing findings of fact and this opinion. It is so ordered.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $901.33, and upon plaintiff's motion for judgment, it was ordered April 3, 1944, that judgment for the plaintiff be entered in the sum of $901.33.

GUIDO F. FORSTER v. THE UNITED STATES

[No. 45646. Decided October 4, 1943]

On the Proofs

Pay and allowances; officer in the Navy, on active duty, with dependent mother; rental and subsistence allowance while on sea duty.— Decided upon the authority of *Arthur A. Ageton* v. *United States*, 95 C. Cls. 718. See also *Donald K. Mumma* v. *United States*, 99 C. Cls. 261.

The Reporter's statement of the case:

Mr. Samuel T. Ansell, Jr., for plaintiff. *Mr. Mahlon C. Masterson* and *Ansell, Ansell & Marshall* were on the brief.

Mr. Wilbur R. Lester, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Guido F. Forster, was appointed a midshipman on September 11, 1913, was commissioned an ensign on March 30, 1917, and temporarily appointed lieutenant (junior grade) July 1, 1917. He continued to serve in the Navy as a commissioned officer until June 30, 1922, when his resignation was accepted under honorable conditions.

He was appointed a lieutenant in the United States Naval Reserve Force on July 13, 1923, and was promoted to lieutenant commander, United States Naval Reserve, on May 15, 1931.

On June 16, 1941, the period on which the present claim begins, he reported to the U. S. S. *Munargo* for active duty, and has remained on active duty continuously since that date. Plaintiff is a bachelor.

2. Plaintiff's father, Guido F. W. Forster, died February 22, 1895. His mother was remarried after the death of plaintiff's father to Clarence J. Weymer, who died on March 28, 1924. She has not since remarried.

3. Plaintiff's mother bought a house in Summit, New Jersey, in 1909, paying $500 in cash, and assuming a first mortgage of $7,500 and a second mortgage of $5,000. The

second mortgage was paid off prior to 1925, $4,000 of this being paid by plaintiff and the first mortgage was reduced to $3,700 by plaintiff in 1936.

Plaintiff's mother was unable to pay the taxes or other expenses incident to the maintenance of this property, and in 1936 transferred to plaintiff the title to the house, in which she was living. At the time the transfer was made plaintiff was in civil life, his only connection with the Navy being that of a Naval Reserve officer.

After the property was transferred to plaintiff he made extensive repairs and improvements thereon amounting to approximately $2,000 and has paid all expenses of every kind incident to the maintenance of the property.

In making the transfer of the house it was agreed between plaintiff and his mother that he would assume all responsibility in maintaining the property and provide a home for his mother as long as she lived. His mother has continued to live in the house without the payment of rent or any other expense.

4. In June 1940 plaintiff's mother broke her leg, necessitating the employment of a nurse at $35 a week until December 8 of that year. Plaintiff's mother has been in poor health ever since and is unable to do any household work. She has never been gainfully employed.

Doctors' bills and all other expenses incident to the care of his mother during her illness were paid by plaintiff.

5. On or about October 2, 1940, plaintiff's mother transferred 775 shares of Standard Brands stock to plaintiff for no express consideration. This stock paid about $310 in dividends during the year 1941.

6. On June 16, 1941, the beginning of the period of this claim, plaintiff's mother owned no real estate. At that time she owned personal property consisting of seven (7) shares of American Telephone and Telegraph Company stock on which she received a yearly dividend of approximately $63, and three shares of Delaware, Lackawanna and Western Railroad Company stock on which she received no dividends. She sold the telephone and telegraph stock in October 1941 to pay off a loan of approximately $700 which she had bor-

rowed on this stock. She still owns the three shares of Delaware, Lackawanna stock which is worth about $4 a share.

7. Since some time prior to June 16, 1941, plaintiff has paid all of his mother's expenses of every kind. Plaintiff's contributions to her for household and living expenses from June 1, 1941, to December 31, 1941, amounted to more than $1,800, and to approximately the same amount for the period from January 1 to October 1, 1942. Plaintiff has made an allotment of $150 a month to his mother and she also holds a power of attorney authorizing her to draw on his bank account whenever she desires.

8. Ever since reporting for active duty on June 16, 1941, plaintiff has been on continuous sea duty and has not occupied any Government quarters, nor has his mother occupied Government quarters at any time.

Plaintiff has never been paid any rental or subsistence allowances on account of a dependent, nor has he ever been paid rental allowance as an officer without dependents.

9. During the period from June 16, 1941, to March 31, 1942, plaintiff was paid one subsistence allowance. A computation by the General Accounting Office for this same period shows that plaintiff as an officer of his rank with a dependent mother is entitled to a rental allowance of $950 and additional subsistence allowances of $346.80, making a total of $1,296.80.

This claim, however, is a continuing one and is therefore subject to further computation.

10. In 1940 plaintiff submitted a claim to the General Accounting Office for rental and subsistence allowance for a dependent mother for the two weeks' training period which plaintiff had as a Naval Reserve officer. This claim was denied.

The record does not show that plaintiff ever submitted any claim for any part of the period encompassed by the present cause of action.

11. During the period covered by the claim, plaintiff's mother was dependent upon him for her chief support.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam* as follows:

Plaintiff sues for the rental and subsistence allowances of a naval officer with a dependent mother, from June 16, 1941, to the date of judgment herein. We have found that his mother was in fact dependent upon him. Plaintiff having been on sea duty during the period of the claim, he is entitled to the full rental allowance of an officer of his rank, with a dependent mother. Section 6 of the act of June 10, 1922, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, was so construed by this court in *Ageton* v. *United States*, 95 C. Cls. 718. See also *Donald K. Mumma* v. *United States*, decided February 1, 1943, 99 C. Cls. 261. He is also entitled to the subsistence allowances of an officer with a dependent mother.

Entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due in accordance with this opinion.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $3,640.40, and upon plaintiff's motion for judgment, it was ordered April 3, 1944, that judgment for the plaintiff be entered in the sum of $3,640.40.

RANDOLPH A. BROWN v. THE UNITED STATES

[No. 45662. Decided October 4, 1943]

On the Proofs

Pay and allowances; Army officer with dependent mother; quarters assigned under the statutes must be "adequate."—Where it is found as a fact that plaintiff, a bachelor officer in the Quartermaster Corps Reserve, United States Army, on active duty is the chief support of his mother; and where during the period of the claim quarters furnished to the plaintiff were, under the statutes and regulations, not adequate quarters for an officer of his rank with a dependent; and where during such period plaintiff did not receive any money allowance in lieu of quarters; it is *held* that plaintiff is entitled to recover the claimed

money allowances for rental and subsistence provided by law for an officer of his rank with a dependent mother for the period June 1, 1941, to June 1, 1942, under the Act of June 10, 1922, as amended by the Act of May 31, 1924, and the regulations issued thereunder by the President, and is further entitled to recover such allowances subsequent to June 1, 1942, under the Act of June 16, 1942. See *Donald K. Mumma* v. *United States*, 99 C. Cls. 261.

Same.—Under the applicable statutes and the pertinent regulations thereunder, it is required not merely that an officer with dependent should receive the money allowance for quarters, as fixed by statute for an officer of his rank, or be furnished the number of rooms so fixed, but also that such quarters, if furnished, must be adequate for occupancy by himself and his dependent.

The Reporter's statement of the case:

Mr. Samuel T. Ansell, Jr., for plaintiff. *Mr. Mahlon C. Masterson*, and *Ansell, Ansell & Marshall* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff, a commissioned officer in the United States Army, brought this suit to recover rental and subsistence allowances as provided by law for an officer of his rank and length of service with a dependent mother for the period June 1, 1941, to date of payment.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was appointed 2nd Lieutenant, Quartermaster Corps Reserve, U. S. Army, August 30, 1940. He accepted the appointment September 10 and entered on active duty May 26, 1941. He has not married.

2. Effective June 1, 1941, plaintiff was assigned Rooms 21 and 22, Building T–28, as quarters at the Air Base, Tucson, Arizona. The rooms so assigned were in a temporary frame building, but plaintiff did not occupy them. They were bachelor's quarters, Partitioned with composition board, having one iron cot, a mattress, pillow, and two iron folding chairs. The building was on concrete stilts about two feet above ground.

From June 24 to July 19, 1941, plaintiff was located at

the Edgewood Arsenal, Maryland, where he occupied one room, similarly furnished. He returned from Edgewood Arsenal to the Air Base at Tucson and, on arrival September 1, 1941, was given and occupied Rooms 22 and 23, Building T–28, as bachelor's quarters. Effective December 23, 1941, the assignment of quarters in Building T–28 was terminated.

3. From December 23, 1941, until January 24, 1942, plaintiff lived in a pyramidal tent at Muroc Bombing and Gunnery Range, Muroc, California. This tent had a wooden floor, field cots, and a stove, but no chairs. Plaintiff shared it sometimes with two and sometimes with three officers.

4. In compliance with orders, plaintiff reported for duty at March Field, Riverside, Calif., January 24, 1942, and was assigned bachelor officer's quarters T–461. These quarters were in a temporary building. March 1, 1942, he was given a joint assignment of quarters in a permanent building at the same post. The joint assignment of quarters at the permanent building was terminated April 21, 1942. The quarters in the permanent building consisted of two rooms, which plaintiff shared with another officer.

5. Plaintiff has not been assigned government quarters since April 21, 1942. None of the quarters assigned to him was adequate for occupancy by a dependent mother, and his mother has never occupied government quarters.

6. Plaintiff's father died January 20, 1937. Surviving him are his widow (mother of the plaintiff), two sons, and a daughter.

He left a small estate, the income from which to the widow amounts to about $6.50 a month on a second mortgage, which includes principal as well as interest. Other principal amounts, not exceeding $1,600 or $1,700, were exhausted in living expenses by the end of the year 1939.

At the time plaintiff entered on active service May 26, 1941, the widow was in receipt of a monthly pension of $20, which, with the income of $6.50, totaling $26.50, constituted her fixed income, outside of immaterial sums which she received irregularly from her own efforts and such income as was derived from her two sons. She has, during the period of this claim, not been capable of self-support.

The elder son, plaintiff's brother, since May 26, 1941, con-

tributed to his mother's support an average of $58.35 a month, including special remittances. Plaintiff contributed to his mother's support during that period an average of $90 a month, including special remittances. The daughter has contributed nothing, due to financial straits.

The mother's expenditures for reasonable and necessary living requirements have substantially equaled her receipts.

Since May 26, 1941, the mother of plaintiff has been dependent upon him for her chief support.

7. Plaintiff has been paid rental allowance for two rooms for the period May 26–31, 1941, at the rate of $40 a month. Beginning May 26, 1941, he has been paid one subsistence allowance. The monthly rental allowance for an officer of plaintiff's rank and length of service with dependent mother for the period December 24, 1941, to January 23, 1942, inclusive, is $40, which he has not been paid. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The evidence is sufficient to show, and we have found as a fact, that since May 26, 1941, plaintiff's mother has been dependent upon him for her chief support. Plaintiff was paid rental and subsistence allowances as provided by law for the month of May 1941. His present claim begins on June 1, 1941.

The next question is whether plaintiff is entitled to recover the statutory money allowance for quarters on the ground that the quarters assigned to him during the period from June 1, 1941, to April 21, 1942, were not adequate quarters for an officer of his rank with a dependent mother. Plaintiff has not been assigned nor has he occupied government quarters since the last-mentioned date.

The facts show that from June 1 to June 23, 1941, plaintiff was assigned two rooms as quarters in a temporary frame building, known as T–28, at the Air Base at Tucson, Arizona. These were bachelor quarters furnished with one iron cot, a mattress, pillow, and two iron folding chairs. Plaintiff did not occupy the quarters so assigned because he was advised that it would be unwise and might jeopardize

his claim for a dependency allowance on account of his mother, and for the further reason that the quarters were not clean. From June 24 to July 19, 1941, plaintiff occupied one room (furnished as stated, in building T–28), at Edgewood Arsenal, Md., furnished like the rooms at Tucson.

From December 23, 1941, to January 24, 1942, he lived at Muroc Bombing and Gunnery Range, Muroc, California, in a pyramidal tent which had a wooden floor, field cots, a stove, but no chairs. He shared the tent, at times, with two, and sometimes three, officers. January 24 to March 1, 1942, plaintiff was assigned and occupied bachelor-officer quarters consisting of two rooms in a building of the type above mentioned at March Field, California, and from March 1 to April 21, 1942, he was assigned and occupied two rooms with another officer at the same post. None of the quarters assigned to plaintiff was adequate for occupancy by plaintiff and his dependent, and his dependent mother has never been furnished or occupied government quarters.

Plaintiff was a bachelor officer having a dependent mother and held the rank of 2d lieutenant and received the base pay of the first pay period.

We are of opinion that plaintiff is entitled to recover the claimed money allowances for rental and subsistence provided by law for an officer of his rank with a dependent mother for the period June 1, 1941, to June 1, 1942, under the act of June 10, 1922, as amended by the act of May 31, 1924, 43 Stat. 250, 251, and the regulations issued thereunder by the President, and is entitled to recover such allowances subsequent to June 1, 1942, under the act of June 16, 1942, 56 Stat. 359. See *Donald K. Mumma* v. *United States*, 99 C. Cls. 261, decided February 1, 1943.

Section 6 of the act of June 10, 1922, as amended by the act of May 31, 1924, *supra*, provided that—

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, * * * while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *

> To an officer having a dependent, receiving the base pay of the first period, the amount of this allowance shall be equal to that for two rooms, * * *.
>
> An officer having no dependent, receiving the base pay of the first or second period, shall receive the allowance for two rooms, * * *.

Paragraph 4 of section 6, first above referred to, provided as follows:

> No rental allowance shall accrue to an officer having no dependents while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

The regulations issued by the President provided that "every officer permanently stationed at a post, yard, or station where public quarters are available will be assigned thereat, as quarters, the number of rooms prescribed by law for an officer of his rank, or a less number of rooms determined by competent superior authority, in accordance with regulations of the department concerned, to be adequate in the particular case for the occupancy of the officer and his dependents, if any; * * *."

Counsel for defendant argues that plaintiff cannot recover rental and subsistence allowances under Section 6 of the Act of May 31, 1924, for the period during which he was assigned two rooms in bachelor-officers quarters, as set forth in the findings, for the reason that "section 6 also prohibits the payment of rental allowance to an officer *with or without dependents* when he is assigned as quarters at his permanent station the number of rooms authorized by law." We do not think the question whether the plaintiff is entitled under the statute to rental allowance during the periods he was furnished bachelor quarters of two rooms provided by law for an officer of his rank with or without a dependent is disposed of so easily. We are of opinion that paragraph 4 of section 6 of the act of June 10, 1922, as amended by the act

of May 31, 1924, above quoted, and the regulations issued by the President and the Secretary of War, contemplated and provided that the quarters furnished should be adequate for the occupancy of the officer and his dependent, or dependents. The statute provides that an officer having a dependent, receiving the base pay of the first period, shall, except as provided in paragraph 4, receive an allowance equal to that of two rooms and, also, that an officer having no dependent, receiving the base pay of the first or second period, shall receive an allowance equal to that for two rooms. It seems clear that the statute intended that an officer having a dependent should either receive the money-rental allowance or be furnished quarters of the number of rooms provided by law *adequate for occupancy by himself and his dependent.* It is admitted by defendant in this case that the two-room quarters furnished plaintiff during certain portions of the period of the claim were quarters provided and intended only for use by bachelor officers without dependents and that they were not adequate for occupancy by plaintiff and his dependent mother. Moreover, paragraph 4 of section 6, above quoted, specifically makes reference to the fact of the adequacy of quarters for occupancy of the officer and his dependents when a less number of rooms, than as otherwise provided by statute, are assigned. If, as the statute clearly states, quarters consisting of a less number of rooms than is provided in the second paragraph of section 6 must be adequate for the occupancy of the officer and his dependents, certainly it was intended that the two rooms provided by the second paragraph of section 6 for an officer having a dependent must also be adequate for the occupancy of himself and his dependent.

Paragraph II of Executive Order 4063 of August 13, 1924, issued under the act of May 31, 1924, provided: "*Assignment of quarters.*—(a). The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the Department concerned of quarters controlled by the government for *occupancy* without charge *by the officer and his dependents, if any.*" [Italics supplied.] See Army Regulations 210–70, August 20, 1934, paragraphs bj (4) and bl (1) and (2).

As to the portion of the claim for rental allowance from June 1, 1942, to date of judgment, plaintiff is entitled to recover the amount fixed in section 6 of the act of June 16, 1942, 56 Stat. 359, 361, which repealed the act of June 10, 1922, effective June 1, 1942. Section 6 of the 1942 act provided for the payment of a lump sum as a rental allowance, depending upon the base pay the officer is receiving, instead of the monetary value of $20 a month for each room to which the officer was entitled under the 1922 act. It fixes the rental allowance of an officer having a dependent and receiving the base pay of the first period at $60 a month. This section also provides that an officer, although furnished with quarters, shall be entitled to a rental allowance as authorized if, by reason of orders from competent authority, the dependents are prevented from occupying such quarters.

Judgment in favor of plaintiff will be entered upon the filing of a report from the General Accounting Office showing the exact amount due in accordance with the foregoing opinion.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $1,981.87, and upon plaintiff's motion for judgment, it was ordered April 3, 1944, that judgment for the plaintiff be entered in the sum of $1,981.87.

FREDERICK C. ALWORTH, JR., v. THE UNITED STATES

[No. 45310. Decided December 6, 1943]

On the Proofs

Pay and allowances; increased subsistence and rental allowances; Army officer on active duty, with dependent mother.—Decided upon the authority of *Mumma* v. *The United States*, 99 C. Cls. 261.

The Reporter's statement of the case:

Mr. Randolph W. Thrower for the plaintiff. *Mr. William A. Sutherland* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Frederick C. Alworth, Jr., during the period March 16, 1938, to March 15, 1939, was a bachelor officer on active duty with the United States Army serving as a First Lieutenant. He was assigned to the Civilian Conservation Corps, and from March 16, 1938, to September 15, 1938, was stationed at the Civilian Conservation Corps Camp at Homerville, Georgia. From September 16, 1938, to March 15, 1939, he was stationed at the Civilian Conservation Corps Camp at Fargo, Georgia. At each of these stations he lived in a temporary building provided for officers stationed at the camp. The building was within the camp area and only men were allowed to live in it. No Government quarters were available for families of officers at either of the two camps. The quarters provided plaintiff were adequate for an officer without dependents, but they were not adequate for an officer with dependents.

2. Plaintiff's mother lived with her husband and two unmarried daughters in a home in Jacksonville, Florida, which was owned by plaintiff's father. The father was 69 years of age and was unable to contribute anything toward the support of plaintiff's mother or the others in the family. His entire earnings for the period in question amounted to $150, all of which was expended in the payment of old debts. The home in which the family lived was incumbered with two mortgages and the total indebtedness exceeded the value of the property. Its fair rental value was about $600 per annum.

The younger daughter was 18 years of age, was not regularly employed, and contributed nothing toward the support of her mother. During the year she earned $150 through temporary employment, which was all spent on her clothing and other personal expenses. The elder daughter was 27 years old, was regularly employed, and earned a monthly

salary of $90. Out of her salary $25 per month was required for her personal expenses, and the remaining $65 per month was given to her mother for the support of the mother, father, and younger sister. The value of the room, board, laundry, and utilities provided the elder daughter in the home was not less than $25 per month, so that her net contribution to the support of her father, mother, and sister amounted to about $40 a month, or $480 a year.

Throughout the period of this claim plaintiff sent his mother a little more than $80 per month, or $1,000 for the year, for the support of his mother, father, and younger sister.

The only other income received by the family during the year was $158 for the rental of one room in the home. The mother was unemployed and she owned no stock, bonds, or other income-producing property. The family had no savings or other assets.

The mother handled the family finances, and out of the total income received by her, she paid $1,723 for her own and the family's living expenses for the year in question. The expenditures consisted of the following items: Food, $960; fuel, $70; interest on the mortgages on the home, $312; utility bills, $196; clothes and family linen, $100; insurance, $25, and incidentals, $60.

A fair proportion of the family living expenses reasonably attributable to the mother during the year involved was $474.34.

Plaintiff's mother was dependent upon him for her chief support.

3. Plaintiff claims rental and subsistence allowances on account of a dependent mother for the period from March 16, 1938, to March 15, 1939.

4. Plaintiff filed a claim with the General Accounting Office for increased rental and subsistence allowances for the 12-month period on account of a dependent mother, but the claim was disallowed.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are not in dispute and show conclusively that the plaintiff's mother was dependent upon him

for her chief support. Plaintiff is entitled to recover rental and subsistence allowances on account of a dependent mother from March 16, 1938, to March 15, 1939, inclusive. (*Mumma v. United States*, 99 C. Cls. 261.) Entry of judgment will be suspended pending the coming in of a report from the General Accounting Office showing the amount due in accordance with the foregoing findings and this opinion. It is so ordered.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $939.00, and upon plaintiff's motion for judgment, it was ordered April 3, 1944, that judgment for the plaintiff be entered in the sum of $939.00.

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED, v. THE UNITED STATES.

[No. 45197. Decided February 7, 1944]*

On the Proofs

Estate tax; statute of limitation begins to run on date of payment of tax estimated to be due.—Where in response to request for an extension of time for filing estate tax return, which extension was granted, the Collector of Internal Revenue in a letter dated December 15, 1934, notified executors that the extension "does not operate to extend the time for payment of the tax;" and where the executors on December 24, 1934, remitted to the Collector check for $120,000 "as a payment on account" of estate tax; and where on February 25, 1935, executors, under the extension of time granted by the Collector, filed a return showing an estate tax of $80,224.24, and the Collector thereupon applied so much of the $120,000 toward the payment of the tax shown on the return and retained the balance in a suspense account, pending the determination of the amount due; it is *held* that the remittance on December 24, 1934, which was a payment of tax estimated to be due, was a payment of estate tax, the statute of limitations (47 Stat. 169, 283) began to run on the day it was paid, and claim for refund filed on March 26, 1938, more than three years after payment was made, is

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* Plaintiffs' petition for writ of certiorari pending.

barred, and plaintiffs are not entitled to recover any part of the $120,000. *Atlantic Oil Producing Co.* v. *United States*, 92 C. Cls. 441, cited.

Same; remittance was not a deposit.—If the remittance of December 24, 1934, had not been a payment but merely a deposit, it would not have prevented the accrual of the penalty for nonpayment of tax when due nor stopped the running of the interest.

Same; timely claim for refund for deficiency.—Where, after audit, the Commissioner of Internal Revenue in April 1938, assessed an additional tax of $48,534.81 and applied to the payment thereof the balance of $39,775.76 remaining in a suspense account, and made demand for the payment of this balance, together with interest, and executors paid this amount $10,497.34, on April 22, 1938; it is *held* that claim for refund filed on May 20, 1940, was timely filed.

Same; exclusion from gross estate of gift made by decedent.—Where decedent's son made a claim against the estate on the ground that certain securities which the executors had taken and treated as a part of decedent's estate had been given to the son by his father during his lifetime; and where after investigation and negotiations the parties came to an agreement, approved by the surrogate, that the sum of $25,000 should be paid in full satisfaction of the claim, which payment was made with approval of the surrogate; it is *held* that the judgment of the surrogate's court had the effect of excluding from the gross assets of the estate so much of the securities which the executors had been administering and plaintiff's executors are entitled to recover.

Same; completed gift during decedent's lifetime.—The surrogate's decree, approving the compromise settlement, was necessarily based upon the theory that there was evidence to show that a completed gift had been made during decedent's lifetime. *Glasscock* v. *Commissioner*, 104 Fed. (2) 475; *United States* v. *Mitchell*, 74 Fed. (2) 571; *Latty* v. *Commissioner*, 62 Fed. (2) 952; distinguished.

The Reporter's statement of the case:

Mr. Carter T. Louthan for the plaintiffs, *Messrs. Mitchell, Taylor, Capron & Marsh* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiffs, Lena Rosenman, a resident of Brooklyn, New York, and the National City Bank of New York, a

national banking association with its principal office in New York City, are the duly qualified and acting executors of the last will and testament of Louis Rosenman who died a resident of King's County, the State of New York, December 25, 1933.

2. December 11, 1934, the plaintiffs requested an extension of time within which to file the Federal estate tax return for the estate and on December 15, 1934, the time to file such return was extended by the Commissioner of Internal Revenue to February 25, 1935, the letter granting such extension reading in part as follows:

> Reference is made to your application of December 11, 1934, for an extension of time within which to file the Federal Estate Tax return, Form 706, for the above-named decedent. As the facts show that it is impossible to file a reasonably complete return on the due date, an extension to February 25, 1935, is hereby granted. No further extension of time will be granted and a return as complete as possible should be filed before the expiration of this extension period.
>
> The extension of time for filing the return does not operate to extend the time for payment of the tax. It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

3. December 24, 1934, plaintiffs delivered to the collector a check for $120,000 accompanied by a letter of transmittal which read as follows:

> Henry Hetkin, Esq., of 70 Pine Street, New York, N. Y., and this office represent Mrs. Lena Rosenman, Mr. Samuel Rosenman and The National City Bank of New York, the executors of the Estate of Louis Rosenman, who died on December 25, 1933. By letter from the Commissioner of Internal Revenue to the executors, dated December 15, 1934, the time to file the Federal Estate tax return for this estate has been extended to February 25, 1935.
>
> We are delivering to you herewith, by messenger, an Estate check payable to your order, for $120,000, as a payment on account of the Federal Estate tax. Kindly acknowledge receipt of this check on the enclosed car-

bon of this letter, and return that carbon to us by the messenger; also kindly send us your usual receipt, in duplicate as soon as convenient.

This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due.

4. Account 9 is a suspense account in the books of the collector of internal revenue for the first district of New York to which monies received in connection with Federal estate taxes and other miscellaneous taxes are deposited if no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list.

5. At the time the collector received such sum of $120,000 from plaintiffs, no assessment of estate tax was outstanding against the estate of Louis Rosenman, and on December 26, 1934, the collector placed the sum of $120,000 to the credit of that estate in Account 9 in his books. February 25, 1935, plaintiffs executed and filed the United States estate tax return of the estate which showed an estate tax of $80,224.24 to be due and payable. Upon the receipt of such estate tax return, the amount of $120,000 standing to the credit of the estate in Account 9 on the collector's books was identified. The tax of $80,224.24 shown to be due on the return was assessed in March 1935, and on March 22, 1935, the amount of $120,000 was classified and $80,224.24 thereof was credited against the assessment of $80,224.24. The balance of such amount of $120,000, that is, $39,775.76, remained in Account 9 to the credit of the estate until April 1938, as shown by findings 8 and 9.

6. March 28, 1935, the collector forwarded to plaintiffs a notice and demand for estate tax which showed that the $120,000 paid in December 1934 had been credited to Account 9 and that $80,224.24 thereof had been applied in satisfaction of the tax of $80,224.24 assessed on the Federal estate tax return.

7. March 26, 1938, plaintiffs filed with the collector a claim for the refund of $39,775.76, the difference between the amount of tax shown to be due on the estate tax return filed for the estate and the $120,000 paid to the collector, on the ground that the notice and demand forwarded to the plaintiffs by the collector on March 28, 1935, showed that $39,775.76 was due and owing to the plaintiffs.

8. On audit of the Federal estate tax return filed by the plaintiffs for the estate, the Commissioner determined that the gross estate was $1,706,596.10, that the allowable deductions exclusive of the specific exemption were $361,361.71, resulting in a net estate of $1,245,234.39 for the purposes of the tax imposed by the revenue act of 1926, and a net estate of $1,295,234.39 for the purposes of the tax imposed by the revenue act of 1932, and that the total net tax, after allowing a credit of $53,335.45 for State estate and inheritance tax payments, was $128,759.08. After taking into account the estate tax of $80,224.24 shown to be due on the return, an estate tax deficiency of $48,534.84 was determined to be due by the Commissioner and notice thereof was mailed to plaintiffs. No appeal was filed by plaintiffs with the Board of Tax Appeals within the ninety-day period allowed for such filing and the deficiency of $48,534.84 was assessed in April 1938.

9. In April 1938 the collector applied the balance of $39,775.76 standing to the credit of plaintiffs in Account 9 in partial satisfaction of the deficiency of $48,534.84 so assessed against plaintiffs. April 16, 1938, the collector demanded payment of the balance of the assessment, that is, $8,759.08, together with interest thereon of $1,738.26. April 22, 1938, plaintiffs paid to the collector the total amount so demanded of $10,497.34.

10. May 26, 1938, the Commissioner rejected the claim for refund filed by plaintiffs March 26, 1938, on the ground that a deficiency of $48,534.84 in Federal estate tax had been assessed and that accordingly there was no overpayment and notified plaintiffs to that effect by notice sent by registered mail on that date.

11. May 20, 1940, plaintiffs filed with the collector a claim

for refund of $24,717.12 of the estate tax theretofore paid on the grounds that in computing the net estate for the purposes of the taxes imposed by the revenue acts of 1926 and 1932 additional deductions should be allowed for $91,685.45 of executors' commissions, for $31,000 of attorneys' fees, for $25,483.69 of miscellaneous administration expenses, and for $25,000 paid to Martin Rosenman in settlement of his claims. May 22, 1940, the Commissioner rejected that claim on the ground that no evidence had been submitted in support of the deductions claimed and on the further ground that the tax in excess of $10,497.34 had been paid more than three years prior to the filing of the claim, and notified the executors to that effect by notice sent by registered mail on that date.

12. The parties to this suit have stipulated that the amounts paid by plaintiffs and allowed by the Surrogate's Court as administration expenses which heretofore have not been allowed as deductions are properly allowable as deductions in determining the net estate of the decedent for the purposes of the Federal estate taxes imposed by the revenue acts of 1926 and 1932 as follows:

Executors' commissions	$79, 030. 26
Attorneys' fees	31, 000. 00
Miscellaneous expenses	25, 483. 69

13. In determining the net estate of the decedent for the purposes of the Federal estate taxes imposed by the revenue acts of 1926 and 1932, the Commissioner did not allow as a deduction the sum of $25,000 which was paid to Martin Rosenman by the estate as shown by subsequent findings.

14. The decedent's only son, Martin Rosenman, for whose primary benefit one-sixth of the decedent's estate was bequeathed in trust under his will (the other five-sixths being bequeathed in trust for the primary benefit of his widow and four daughters) filed two claims against the decedent's estate. The first claim dated February 27, 1934, read as follows:

> I hereby make demand upon you for the delivery to me as soon as practicable, the following securities with uncollected coupons attached, which were held by the deceased for my account: [Then followed a list of fourteen securities.]

The second claim, dated July 23, 1934, read as follows:

> I hereby make demand upon you for interest, dividends and proceeds of sales with interest from this date, of the following securities belonging to me or having belonged to me until their sale, which were in the possession of the late LOUIS ROSENMAN. He collected these items and failed to turn them over.
>
> [Then followed a list of the same securities as shown in the letter of February 27, 1934, with two or three additions.]
>
> The basis of this claim is practically the same as that of my letter of February 27, 1934. These items may all be found in the check book of the deceased under my name and in his ledger as well.
>
> You will find that the deceased, on making transfer of securities often reserved for himself all coupons maturing within two months of the transfer.

The contention of Martin Rosenman was that the decedent had made gifts of these securities to him (Martin) during the decedent's lifetime, and that these securities and the proceeds therefrom were in the possession of the decedent at the time of his death, but were held by the decedent at that time for Martin's account. The total amount of Martin's claims against the estate was approximately $167,000, such amount being the approximate value at the time of decedent's death of the property which Martin claimed.

15. On decedent's death the securities claimed by Martin Rosenman were found in two safe deposit boxes of the decedent, to one of which Martin had access. Some evidence existed which tended to support the claim, but after making as thorough investigation as it was possible to make, including examining the decedent's records, checking his office files, interviewing the bookkeeper who kept a record of his securities and the income therefrom, and examining Martin's income tax returns which were prepared prior to the decedent's death and signed by the decedent as Martin's agent, plaintiffs concluded that Martin did not have a just and valid claim for the securities and cash to the extent claimed and accordingly notified him October 25, 1934, that the claim was rejected.

Thereafter further negotiations were carried on between the parties for a settlement of the controversy with the re-

sult that on June 8, 1935, an agreement was reached under which plaintiffs agreed, subject to the approval of the Surrogate's Court, to pay, and Martin agreed to accept, $25,000 in full payment and satisfaction of his (Martin's) claims. In presenting the matter to the Surrogate's Court for approval, plaintiff stated they had concluded the compromise was fair and reasonable for the following reasons:

> The validity of the claim was apparently sustained to some extent by the fact that the decedent caused income tax returns to be prepared for the said claimant Martin Rosenman, reflecting in the same the income from the said securities and the losses resulting from the sales of such of the securities as were sold during the taxable year, which tax return entries could not be explained by a desire of the decedent to minimize income taxes, for the reason that the income returned was exceeded by the loss returned. Your petitioners were also influenced by the fact that the adult beneficiaries substantiated the contention of the said Martin Rosenman to the effect that the decedent intended to make a gift of the said securities, being motivated by a desire to equalize gift provisions which he had already made for the benefit of his other adult children, and moreover, your petitioners are informed and believe that the other adult children acknowledge that provisions were made for their benefit by the decedent which have not been otherwise equalized with respect to said Martin Rosenman. Your petitioners were also greatly influenced in arriving at their conclusion that the said offer of compromise was just, in that it would tend to preserve a more harmonious family relationship, avoid the uncertainties of litigation involving a possible maximum loss to the Estate in excess of $167,000, and save the expense and avoid the danger of protracted litigation. Accordingly, when your petitioners ascertained that all of the adult beneficiaries interested in said Estate agreed with the foregoing, they entered into the compromise agreement which, as aforesaid, is hereto annexed and made a part hereof.

16. Pursuant to the provisions of section 19 of the Decedent Estate Law of New York, a formal written agreement setting forth the terms of the settlement referred to in the preceding finding was entered into, subject to the ap-

proval of the Surrogate's Court, which was executed by the executors, Martin Rosenman, all adult beneficiaries of the estate, and the guardians representing an infant and unknown beneficiaries. The plaintiffs filed a verified petition in the Surrogate's Court, Kings County, New York, to which were attached such agreement of compromise and copies of the claims of Martin Rosenman. Such petition set forth the facts relating to Martin Rosenman's claims and the propriety of the compromise and described the infant and adult persons, as well as the unborn and unknown persons, whose interests would or might be affected by such compromise, and prayed that the Court take such action and make such decrees as might be necessary to approve such compromise and make it binding upon all parties interested in the estate.

17. The Surrogate's Court appointed a special guardian to represent the interests of the infant beneficiary of the estate who was over fourteen years of age and a special guardian to represent the interests of the other infant and unborn and unknown beneficiaries of the estate and appointed a referee to ascertain the jurisdictional facts and to hear and determine whether the proposed compromise was a proper one and to report to the Court. The referee held hearings at which evidence was introduced as to whether it was a fair compromise. One of the guardians originally filed a report objecting to the proposed compromise, but later withdrew such objection and the other guardian filed a report approving the proposed compromise. After the hearings and in accordance with the instructions of the referee, both guardians signed the compromise agreement on behalf of their wards, subject to the approval of the Surrogate's Court. The referee reported to the Surrogate's Court that such proposed compromise was a proper one and that it should be approved. The Surrogate's Court entered a final decree in the proceeding approving the compromise and ordering the executors to pay $25,000 to Martin Rosenman in full satisfaction of his claims upon the delivery by Martin Rosenman of an instrument acknowledging the receipt of such sum in full satisfaction of his claims. Such $25,000 was paid to Martin Rosenman by the executors, and Martin Rosenman

delivered an instrument acknowledging receipt of such sum in full satisfaction of his claims.

The court decided that the plaintiffs were entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs, as the executors of the last will and testament of Louis Rosenman, sue to recover estate taxes alleged to have been erroneously exacted. The claim is based upon their right to deduct from the gross estate sums for executors' commissions, attorneys' fees, miscellaneous expenses, and an item of $25,000 paid to Martin Rosenman in settlement of a claim he presented against the estate.

The items of executors' commissions, attorneys' fees, and miscellaneous expenses are not in dispute, but defendant denies that the estate is entitled to the deduction of the $25,000 paid to Martin Rosenman in settlement of his claim. The defendant also says that the plaintiffs are barred from collecting all of the amount claimed, except $10,497.34, because the balance is barred by the statute of limitations on the filing of claims for refund.

The latter defense we shall discuss first.

Louis Rosenman died on December 25, 1933. The executors were due to file an estate tax return on December 25, 1934, but as this date approached plaintiffs saw that it would be impossible by that time to file an accurate return; they, accordingly, on December 11, 1934, requested an extension of time. The Commissioner granted an extension until February 25, 1935, but in his letter, dated December 15, 1934, granting it he stated:

> The extension of time for filing the return does not operate to extend the time for payment of the tax. It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

In response thereto the plaintiffs on December 24, 1934, forwarded the Collector a check for $120,000 "as a payment on account of the Federal Estate tax." On February 25, 1935, plaintiffs filed a return showing a tax of $80,224.24.

The Collector applied so much of the $120,000 toward the payment of the tax shown on the return, and retained the balance in the suspense account in which the remittance had been originally deposited, pending an audit of the return. After an audit, the Commissioner, in April 1938, assessed an additional tax of $48,534.84. The balance remaining in the suspense account, $39,775.76, was applied toward the satisfaction of this deficiency, and demand was made on the plaintiffs for the payment of the balance, together with interest. The plaintiffs paid this amount, $10,497.34, on April 22, 1938.

When plaintiffs filed the return showing the tax due of $80,224.24, they did not immediately demand refund of the balance they had remitted on account of the tax, to wit, $39,775.76; but, no audit of its return having been made by March 26, 1938, plaintiffs on that date did file a claim for refund of the balance. This was about three years and three months after the remittance. Then, after payment of the additional tax assessed, plaintiffs filed another claim for refund on May 20, 1940, on the ground that the Commissioner had not allowed deductions of $91,685.45 for executors' commissions, $31,000 for attorneys' fees, $25,483.69 for miscellaneous administration expenses, and $25,000 which was paid in settlement of Martin Rosenman's claim.

Plaintiffs' right to recover depends on whether or not these two claims were filed within the statutory period of three years.[1]

Plaintiffs say that the remittance of $120,000 was merely a deposit and was not a payment of tax, and that the date the statute began to run was the date the deposit was applied in settlement of the tax found to be due. This position is untenable. The $120,000 was paid in response to the above-quoted statement in the Commissioner's letter granting the extension of time for filing the return, in which he stated that the extension of time for filing the return did not extend the time for payment of the tax, and in which he suggested that the tax be estimated and paid to avoid delinquency in payment and the consequent liability for penalty and interest. In the letter transmitting the $120,000 the executors

[1] Sec. 810 of the Revenue Act of 1932, 47 Stat. 169, 283.

said that it was being transmitted "as a payment on account of the Federal Estate tax."

If it had not been a payment, but was merely a deposit, it would not have prevented the accrual of the penalty for non-payment when due, nor stopped the running of interest. It was a payment of the amount of tax estimated to be due.

The fact that the Collector put the money in a suspense account to the credit of the executors seems to us immaterial. At the time the Collector received the money there was no charge on his books against plaintiffs against which the remittance might be credited; hence, he merely put it in a suspense account until the amount of plaintiffs' liability could be determined.

The $120,000 was a payment of estate tax, and the statute, therefore, began to run on the day it was paid. *Atlantic Oil Producing Co.* v. *United States*, 92 C. Cls. 441, 35 F. Supp. 766.

The first claim for refund was not filed until more than three years thereafter. Plaintiffs, therefore, are barred from the recovery of any part of the $120,000.

The second claim for refund was filed within three years of the payment of the $10,497.34, and plaintiffs, therefore, are not barred from recovering such sum if it was in fact an overpayment.

This brings us to the question as to whether or not the plaintiffs are entitled to the deduction of the $25,000 paid in settlement of the claim of Martin Rosenman against the estate.

Martin Rosenman claimed that the decedent, his father, had given him $167,000 worth of securities during his lifetime, which the executors had taken and had treated as a part of the decedent's estate. These securities were found in two of decedent's lock boxes, to one of which Martin Rosenman had access. He claimed that the gift had been completed by delivery during decedent's lifetime and that the securities were in the possession of the decedent only for the purpose of administration for Martin Rosenman's benefit. On February 27, 1934, two months after his father's death, he made demand on the executors for the delivery of the securities to him, which he said "were held by the de-

ceased for my account." Later, on July 23, 1934, he made demand upon them for the interest, dividends, and proceeds of sales of such securities as had been sold during the lifetime of Louis Rosenman. He said that the deceased had "collected these items and failed to turn them over," but he said that "these items may all be found in the check book of the deceased under my name and in his ledger as well."

At first the executors rejected his claim, but as the result of further negotiations the parties came to an agreement on $25,000, to be paid in full satisfaction of Martin Rosenman's claims, subject to the approval of the Surrogate's Court. In the petition filed in the Surrogate's Court asking approval of the compromise, the executors said in part:

> The validity of the claim was apparently sustained to some extent by the fact that the decedent caused income tax returns to be prepared for the said claimant Martin Rosenman, reflecting in the same the income from the said securities and the losses resulting from the sales of such of the securities as were sold during the taxable year, which tax return entries could not be explained by a desire of the decedent to minimize income taxes, for the reason that the income returned was exceeded by the loss returned.

So, the executors were of the opinion that there was some evidence to show that the deceased had in fact made a gift during his lifetime to Martin Rosenman.

The Surrogate's Court appointed a special guardian to represent the interests of an infant beneficiary of the estate, and also a special guardian to represent another infant and the unborn and unknown beneficiaries of the estate. In the proceedings before a referee appointed to hear the matter, one of the guardians at first filed a report objecting to the compromise, but later withdrew his objection and agreed to it. The other guardian also agreed to the compromise. After a hearing the referee reported that the compromise was proper and should be approved, and the Surrogate's Court entered a decree accordingly.

The defendant says that Martin Rosenman's claim was based upon a mere promise to make a gift and, therefore, does not constitute a legal claim against the estate. This is

manifestly incorrect. Martin Rosenman claimed that a gift had actually been made during the lifetime of the decedent. Upon no other basis could the Surrogate's Court have approved the compromise. If there had been nothing more than a promise to make a gift, Martin Rosenman would not have had any claim against the estate that would have justified the payment of anything. The decree approving the compromise was necessarily based upon the theory that there was some evidence to show that a completed gift had actually been made during decedent's lifetime.

The defendant also says that the claim cannot be allowed because of the provision of the statute that deductions for claims against the estate were limited to such claims as "were contracted bona fide and for an adequate and full consideration in money or money's worth." It says a promise to make a gift is not supported by such consideration, but this argument fails for the same reason stated.

Martin Rosenman claimed, not under a promise, but as the result of a completed transaction. The statute refers to executory contracts, not to executed ones. Martin Rosenman's claim was that $167,000 worth of the securities, treated by the executors as a part of the assets of the estate, were not a part of its assets at all, but were his assets, because they had been given to him by the decedent during his lifetime. The judgment of the Surrogate's Court approving the settlement of $25,000 had the effect of excluding from the gross assets of the estate so much of the securities which the executors had been administering.

In neither *Glascock* v. *Commissioner*, 104 F. (2d) 475, nor *United States* v. *Mitchell*, 74 F. (2d), 571, nor *Latty* v. *Commissioner*, 62 F. (2d) 952, relied on by defendant, was it claimed that there had been a fully consummated gift during the lifetime of the decedent.

The plaintiffs are entitled to recover, but the entry of judgment will be suspended until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report from a commissioner, showing the amount due, computed in accordance with this opinion. It is so ordered.

MADDEN, *Judge;* and LITTLETON, Judge, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

In accordance with the above opinion and upon a stipulation filed by the parties showing the amount due thereunder to be $10,497.34 together with interest thereon as provided by law from April 22, 1938, and upon plaintiff's motion for judgment, it was ordered April 3, 1944, that judgment for the plaintiff be entered in the sum of $10,497.34 together with interest thereon as provided by law from April 22, 1938.

MORRIS STEIN, FRANK S. SCHWINGER, COPARTNERS, TRADING AS REGAL EQUIPMENT COMPANY, v. THE UNITED STATES

[No. 44315. Decided April 3, 1944]*

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act.—Following the decision in *John E. Sjostrom Co., Inc.* v. *United States*, 100 C. Cls. 548, it is *held* that the evidence in the instant suit is not sufficient to show that increased labor costs were the result of the enactment of the National Industrial Recovery Administration Act.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for the plaintiff.

Mr. N. A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Currell Vance* was on the briefs.

The court made special findings of fact as follows:

1. The plaintiffs are copartners, trading and doing business under the firm name and style of Regal Equipment Company, with its office and main place of business in New York City, New York. Plaintiffs are residents of the State of New York.

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*Plaintiffs' motion for new trial overruled June 5, 1944. Plaintiffs' petition for writ of certiorari pending.

2. This action is brought pursuant to the Act of Congress approved June 25, 1938 (52 Stat. 1197), entitled "An Act to confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933."

3. At the times here involved plaintiffs were engaged in buying and selling various textiles, such as piece goods, sheets, pillow cases, linens, and similar articles. They were not manufacturers.

On July 1, 1933, they entered into a contract with the Treasury Department to supply to the Government on order of various of its agencies certain textiles listed under plaintiffs' name in the General Schedule of Supplies, fiscal year 1934.

A copy of the contract is in evidence and made part hereof by reference. It bears serial number Tgs. 9377. Its terms and requirements have been fully executed by both parties.

4. The prices listed in the general schedule, which was made a part of the contract, were the agreed prices for the articles to be supplied. The prices so agreed to were based by plaintiffs on prices prevailing before enactment of the National Industrial Recovery Act.

Upon receipt of an order from a Government agency for articles listed in the general schedule, plaintiffs went into the market, bought the article, and invoiced it to defendant at the contract price. In so doing they ran the risk of an increase in market price, or gained a greater profit in the event of a decrease in market price.

Shipments under the contract were made directly from the manufacturers to Governmental institutions involved.

5. The plaintiffs signed the President's Reemployment Agreement August 9, 1933.

6. Under the provisions of the Act of June 16, 1934, 48 Stat. 974, and within the limitation provided in Section 4 of that Act, plaintiffs presented to the Treasury Department a claim for increased costs of performance under the above-

described contract. The claim was disallowed by the Comptroller General for lack of sufficient proof.

7. The proof is insufficient to show the amount of the increase in cost of performance of plaintiffs' contract as a result of the passage of the National Industrial Recovery Act.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue to recover increased costs due to the passage of the National Industrial Recovery Act.

On July 1, 1933, plaintiffs entered into a contract with the defendant to furnish certain supplies, such as piece-goods, sheets, pillow cases, linens, bedspreads, and similar articles, at stated prices upon order during the year July 1, 1933, to June 30, 1934. Plaintiffs' bid was put in during February 1933; the contract was awarded in June 1933. During the year goods in the amount of about $8,000 were ordered by the defendant and were supplied by plaintiffs. When the goods were ordered plaintiffs went into the open market and bought them as cheaply as possible, and resold them to the defendant at the contract price. They claim that the passage of the National Industrial Recovery Act increased the prices they had to pay for the goods purchased by them, with the result that their cost of fulfilling the contract was increased. They sue for the sum of $4,376.12.

At the hearing before the Commissioner it was admitted that this claimed increase was in part due to processing taxes in the amount of $1,228.48; this amount they have eliminated from their claim. They also admit that the last two items of their claim were not sold in pursuance of the contract under which they sue.

The commissioner has eliminated from the amount claimed both the processing taxes and the last two items above mentioned, and as a result has found that plaintiffs' costs were increased as the result of the passage of the National Industrial Recovery Act by the amount of $2,883.25.

We have carefully examined the testimony introduced

and we are of the opinion that plaintiffs have not shown the amount by which their costs were increased as the result of the passage of this Act. The only testimony as to the amount of the increase is the claim filed by them with the Comptroller General under the Act of 1934, and the testimony of plaintiff Stein that this claim accurately stated the difference between what plaintiffs were compelled to pay for the goods purchased by them for resale to the defendant and the amount for which they could have purchased them at the time they put in their bid. Plaintiff Stein also testified that this increase was the result of the passage of the National Industrial Recovery Act.

The testimony of the people from whom plaintiffs purchased these goods was not introduced. No other testimony to show the reason or reasons for the increase in cost was introduced. The persons from whom plaintiffs purchased these goods had much more intimate knowledge of the factors bringing about the increase than did plaintiffs. Plaintiff Stein's own testimony cannot be regarded as other than an assumption on his part. Undoubtedly the National Industrial Recovery Act was partially responsible for the increase, but, for all we know, other factors may have contributed thereto. For instance, we know that the levy of processing taxes increased prices. There may have been other factors.

Plaintiffs did introduce a document put out by The Cotton-Textile Institute, Inc., which recommended to its members an adjustment of prices on pre-existing contracts on account of the increase in prices due to the passage of the National Industrial Recovery Act. Some of the items included in this pamphlet were sold to the defendant by plaintiffs; but the increase in prices of such items recommended by The Cotton-Textile Institute was substantially less than that claimed by plaintiffs. This document is proof of the fact that there was some increase in the price of some of the articles sold due to the passage of the National Industrial Recovery Act, but it disproves plaintiff Stein's statement as to the amount of that increase. Documents introduced by the defendant show that causes other than the National Indus-

trial Recovery Act contributed to an increase in prices of such goods.

As to the items not included in the document of The Cotton-Textile Institute, plaintiff Stein's testimony stands alone. We cannot accept his unsupported statement, made with so little opportunity to know the facts, as sufficient proof of the facts alleged in the petition.

On this state of the record we are obliged to hold that plaintiffs have not proven their case. *John E. Sjostrom Co. Inc.* v. *United States*, 100 C. Cls. 548. Plaintiffs' petition will be dismissed. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

IRWIN & LEIGHTON v. THE UNITED STATES

[No. 44915. Decided April 3, 1944]

On the Proofs

Government contract; decision of contracting officer not binding upon the Court; the defendant bound by decision of its own contracting officer.—In a suit involving a Government construction contract the Court is not bound by the findings of the contracting officer as to damages due to delay (*Langevin* v. *United States*, 100 C. Cls. 15), but unless the clear weight of the evidence shows the delay was less than that found by the contracting officer, the Government is bound by his finding.

Same; extension of time by contracting officer on account of delay; contractor not entitled to recover for such delay.—Where the contracting officer extended plaintiffs' contract time on account of delay due to defendant's consideration of proposed changes; and where, according to the evidence adduced, it is questionable whether or not the plaintiffs were delayed at all on account of the change in question; and where it is found that the delay was not unreasonable; it is *held* that the plaintiffs are not entitled to recover. *Magoba Construction Co.* v. *The United States*, 99 C. Cls. 662, 690; *Silberblatt & Lasker, Inc.* v. *The United States*, 101 C. Cls. 54, cited.

Same; delay by strike for which Government was not responsible; damages not recoverable therefor.—Where contractors were delayed 20 days by a strike in subcontractor's plant, for which

the Government was not responsible; and where the contractors requested an extension of time of 20 days on account thereof, which extension was granted by the contracting officer; it is *held* that the plaintiffs are not entitled to recover damages for such delay. *Young-Fehlhaber Pile Co.* v. *United States*, 90 C. Cls. 4, 16, cited.

Same; recovery for delays for which Government was responsible.—It is *held* that plaintiffs in the instant case are entitled to recover damages for 32 days' delay for which the Government was responsible, including home office overhead.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiffs.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

1. Irwin & Leighton is a partnership composed of Alexander D. Irwin and Archibald O. Leighton, both citizens of the United States. Under the partnership name of Irwin & Leighton plaintiffs are engaged in the building construction business and maintain their offices in the city of Philadelphia, Pennsylvania.

2. On August 15, 1935, plaintiffs entered into a contract with defendant, represented by C. J. Peoples, Director of Procurement, Treasury Department, as contracting officer, whereby, in consideration of the sum of $686,450, they agreed to furnish all labor and materials and to perform all work required for the construction of a Post Office and Court House at Wilmington, Delaware, in accordance with specifications and drawings made a part thereof. Said contract provided that work thereunder was to be commenced as soon as practicable after the date of receipt of notice to proceed, and to be completed within 410 calendar days after the date of receipt by plaintiffs of this notice. This was received by them on August 28, 1935, thereby fixing October 11, 1936, as the completion date, after which date plaintiffs were chargeable in the sum of $200 a day as liquidated damages. Plaintiffs commenced work on September 3, 1935. Construction was completed February 5, 1937, 117 days after October 11, 1936, and the building was accepted by the Government on February 6, 1937. As a result of 36 allowances for extra

work and change orders, as well as deductions for certain work omitted, the final net cost of the building was the sum of $697,611.48. No liquidated damages were assessed, plaintiffs having been granted extensions of time sufficient to cover the period of delay, as hereinafter set forth.

3. The contract provided as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

* * * * *

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government

does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

*   *   *   *   *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

The specifications provided as follows:

Architect.—Wherever the term "Architect" is used in this specification it refers to Associated Federal Architects, Incorporated, of Wilmington, Delaware, who by contract with the U. S. Treasury Department are authorized to prepare all drawings and specifica-

tions and full-size details, pass on all shop drawings, approve or reject architectural samples as listed herein, criticize and approve plaster models of ornamental work as shown or noted on contract drawings.

General Requirements.—

* * * * *

15. *Construction Engineer.*—The Construction Engineer herein mentioned will be detailed by the Procurement Division, Public Works Branch, to supervise the work under this specification.

* * * * *

30. *Temporary Heating.*—The contractor shall provide temporary heat as necessary to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer.

* * * * *

42. *Models.*—The Government will furnish the models indicated on the drawings. Any additional models of rights, lefts, miters, etc., and any patterns required shall be provided by the contractor.

43. Models will be delivered F. O. B. at points designated by the contractor, who shall furnish the Procurement Division, Public Works Branch, with full shipping directions. The Government bill of lading will be sent to the consignee, who shall fill out the "Certificate of Delivery" and surrender the Government bill of lading to the carrier as payment for the shipping charges. The contractor or his authorized agent shall receive the models, be responsible for all charges for storage, etc., after notification that the models have been shipped, and for the care of the models from the time of delivery to him.

44. The models shall be unpacked immediately and examined. Dimensions shall be verified, and any discrepancies or damage shall be reported in writing to the Procurement Division, Public Works Branch. No repairs or alterations shall be made without written instructions from the Procurement Division, Public Works Branch.

45. The contractor shall deliver such models at the building for verification of the work executed therefrom when so directed by the Procurement Division, Public Works Branch. After completion of the contract the models are to be destroyed, unless permission is obtained from the Procurement Division, Public Works Branch, to dispose of them otherwise.

MODEL DELAY

4. There were 11 limestone ornamental carvings to be set in various parts of the exterior of the building, such as window pedestals, columns, and pillars. Unless these carvings were on hand when the limestone setting reached the parts of the building in which they were to be placed, the orderly progress of the limestone work would be interrupted. The carvings were to be fabricated at plaintiffs' stone subcontractor's plant in Indiana from models to be furnished plaintiffs by defendant, as stated in the specifications. The models were prepared for defendant by a New York City company under an independent contract with defendant. The procedure adopted under such independent contract was as follows: The architects of the building, The Associated Federal Architects, Inc., of Wilmington, Delaware, who were also employed by defendant on this project under an independent contract, first prepared details for the modeler. The modeler then prepared models in clay. These models were then photographed and the photographs first sent to the architects and then to the Treasury Department for approval. Upon such approval the modeler then made plaster models which were similarly photographed and approved. Thereupon the modeler shipped the models directly to plaintiffs' limestone contractor in Indiana. Defendant was advised of the schedule of dates the models should be in the hands of plaintiffs' subcontractor. On the basis of their progress schedule calling for the commencement of limestone setting on December 23, 1935, plaintiffs would reach the point in the building where they would be ready to set the carvings to be made from the models sometime in January 1936, and if the subcontractor had the models on December 10, 1935 (the date indicated by plaintiffs that the first models should be in the hands of the subcontractor), it was anticipated that the carvings would be at the site and ready to be placed on time. However, due to delay on the part of the defendant, instead of receiving any models on December 10, 1935, the first time plaintiffs' subcontractor received any models was February 28, 1936, when they received 6 of the 11 models. Two of such

models were originally scheduled for receipt on December 10, 1935, and the other 4 on December 15, 1935.

5. From December 10, 1935, the date of scheduled receipt of said two models, to February 28, 1936, the date of their actual receipt, is 80 days. Plaintiffs claim that they were delayed a like number of days in the work of setting limestone.

All of this delay was not attributable to the defendant. During the first months of their contract plaintiffs incurred delay in their operations arising from late delivery of structural steel, brick, tile, waterproofing, and granite. They were delayed in their work on foundation walls and in pouring floor slabs, and on account of difficulty with unsatisfactory metal forms; also by substitution, at plaintiffs' suggestion, of a type of granite different from that called for in the specifications.

The subject of delays attributable to plaintiffs was taken up in letters written by the defendant to plaintiffs on November 20, 1935, and also on January 2, 1936, calling attention to very unsatisfactory progress being made on the contract. Plaintiffs were informed that their failure to maintain normal progress was the subject of an adverse comment on progress report for October 1935, and that Mr. Irwin had stated that the actual progress would be improved but that the lag had increased.

At the end of December 1935 the building was 18.4 percent complete, whereas it should have been 35 percent complete according to plaintiffs' progress schedule.

January 4, 1936, plaintiffs acknowledged the receipt of defendant's letter of January 2 and stated that they were cognizant of the fact that there was a lag behind normal schedule, but that they were confident that by arranging for the manufacture and delivery of items required at a later date the loss of time would be more than compensated.

Plaintiffs' work was also seriously interrupted by reason of unusually severe cold and rainy weather, for which plaintiffs requested the defendant to grant them 51 days' extension of contract time. These delays, with the exception of 4 days in September, were in December 1935, January and

February 1936. Defendant granted at the time an extension of 27 days, the notice of delay having been given within the time required by Article 9 of the contract; 17 days of the extension requested was not granted at the time because of plaintiffs' delay in giving the required notice, but this extension was granted at completion of the contract, although the defendant failed to advise plaintiffs of this fact.

6. By reason of the delays mentioned, plaintiffs did not begin setting granite, which was scheduled for the period December 9 to January 13, until March 13, 1936; nor did they begin the setting of limestone scheduled for December 23 to March 15, a period of 83 days, until March 24, 1936, and instead of completing it March 15, 1936, they finished August 16, 1936, a period of 146 days. Carvings were not needed at this date, March 24, 1936, nor until plaintiffs reached the first-floor elevations, which was about April 30, 1936. Plaintiffs had only begun the erection of derricks on or about March 2, completing them about March 26.

When plaintiffs, in the operation of setting limestone, did reach the points where the carved ornamental units were to be incorporated into the structure in the orderly prosecution of the work, some of them were not on hand. This delay was attributable to the defendant. However, plaintiffs proceeded with their work, leaving openings in the limestone walls so that the carved units could be incorporated when they arrived. There was not a complete suspension of limestone work due to waiting for carvings.

7. Due to the late submission of models by the defendant, the operation of setting limestone was caused to progress in an irregular manner, slowed down, and plaintiffs were caused delay and additional expense thereby. The limestone work was retarded, and plaintiffs were compelled to use their hoisting equipment at less than half of its normal capacity. As stated, plaintiffs in their progress chart had allowed 83 days for the setting of limestone, and actually required 146 days.

The other operations on the building proceeded with a large force and in considerable volume, and payments to plaintiffs as shown by progress reports for April to August

1936 were in amounts in line with other months where there were no delays.

8. Weather delays were in large part concurrent with the model delays. Work on the building as a whole was retarded but not stopped by the model delays. There is no satisfactory proof that plaintiffs were delayed by defendant's failure to furnish models according to schedule more or less than 32 days in the ultimate completion of the building, as found by the contracting officer, and his finding, accordingly, is adopted.

9. The defendant admitted that plaintiffs suffered delay by not having models in due time, and on July 14, 1936, defendant's Director of Procurement advised plaintiffs:

> The delay with regard to the models was largely due to the extreme care taken by the Architects who designed the building in perfecting full-size details on which the models were based; as well as in criticizing and ordering corrections in the models after they were cast. Some of these models were intricate, and due to their importance in relation to the design of the building, some time was required in which to perfect them to accord with the wishes of the architects. In the period involved in your request for 80 days for the delay, some time was concurrent with the delays recognized above on severe weather conditions. In addition, the engineer reports that while your statements are correct with regard to the dates, etc., the building as a whole was not entirely affected. It appears that the proportionate delay to the entire project amounted to approximately 32 calendar days. As you reported this delay within ten days, as required by Article 9 of your contract, it is recognizable thereunder.

The defendant allowed plaintiffs an extension of 32 days on account of delay in receiving models, under Article 9 of the contract, and plaintiffs did not appeal from the contracting officer's findings.

PENTHOUSE AND COPING CHANGES

10. The contract called for certain small penthouses on top of the third story to be faced with brick. These were for the purpose of housing elevator machinery, etc. The defendant

determined that they should be faced with limestone instead of brick and that the coping of a set-back on the third floor should be lowered. This modification involved some alteration in the interior of the penthouses, whereby they would be plastered rather than remain of unfinished brick, and certain changes in waterproofing and sheet-metal work.

The changes were initiated by defendant's architects during the month of November 1935, when plaintiffs were requested to submit a proposal for the work, which they did on November 22, 1935, in the sum of $1,534.50, which included 10 percent profit, without any request for extension of time. Considerable correspondence between plaintiffs and defendant ensued, during the course of which plaintiffs submitted several revised estimates for performing the work under the proposed change, including one submitted on April 3, 1936, in the amount of $2,567.00. This amount included 10 percent overhead and 10 percent profit and an amount of $600.00 for "Additional Job Administrative Expense Due to Delays." Plaintiffs were advised by defendant's construction engineer on April 8 that he was without authority to approve any charge for overhead or profit beyond 10 percent overhead and 10 percent profit.

During the course of the negotiations and correspondence between the parties plaintiffs had several times asked defendant for a determination as to whether or not the proposed change would be made as, it was alleged, it would vitally affect shop drawings and fabrication of the stone. February 12, 1936, plaintiffs wrote the defendant that immediate information was desired so that the stone might be fabricated and that at the time of adjustment there should be an extension granted in the contract time. This was substantially repeated in plaintiffs' letter to the defendant of March 11, 1936. On April 3, 1936, plaintiffs referred to their letter of March 11 claiming an extension of time of 30 days because of the length of time elapsing between the time this change was first contemplated and the time the drawings were actually made.

Defendant did not determine upon final drawings for this change until March 13, 1936; these were transmitted to plaintiffs in a letter of defendant's construction engineer

dated March 28, 1936. In order to obviate further delay in carrying on the work, pending agreement upon a satisfactory price, the defendant telegraphed plaintiffs on April 8, 1936, as follows:

> To avoid delay you ordered proceed with changes and revisions penthouses and third-floor copings shown on drawing AFA one hundred three, price to be determined later but not to exceed figure named, twenty-five hundred sixty-seven dollars, your revised proposal April third additional your contract construction post office Wilmington, without further modification its term except time.

Subsequent to the order to proceed with the work, under date of April 13, 1936, plaintiffs submitted a further revised estimate of $1,529.58, which included 10 percent overhead and 10 percent profit. April 30, 1936, defendant's Assistant Director of Procurement wrote plaintiffs approving their estimate as an addition to the contract. In this letter the Director requested plaintiffs to forward a statement of the exact number of days they had been delayed on completion of the building.

Had plaintiffs wished to vary from the normal program in setting limestone, to wit, beginning at the bottom and working upwards, they could have set the limestone around the penthouses beginning on April 12, 1936; but in setting the limestone plaintiffs began at the bottom and worked upwards and did not reach the penthouses until July 2, 1936. Prior to this time the limestone for them had been delivered to the job. It was delivered sometime during the month of June.

11. Under date of July 14, 1936, defendant's contracting officer ruled as follows:

> * * * the change in the penthouses and copings was brought up in November 1935 and was not settled due to revisions in the drawing until April 8, 1936. You requested 30 days for the change, but the engineer reports that 6 days of this time was concurrent with other work going on and that the entire building was delayed 24 days. This was reported within 10 days as required by Article 3 of the contract and is considered equitable.

Summing up the above conclusions:

> * * * Under Article 3 of your contract, the time is hereby extended twenty-four (24) calendar days on account of the change in penthouses, etc. * * *

No appeal was taken by plaintiffs from this decision of the contracting officer.

It is not known that plaintiffs suffered a greater delay on the entire project due to this change than the 24 days granted by the defendant.

JUDGE'S LIBRARY CHANGE

12. On September 12, 1936, defendant requested plaintiffs to submit a proposal for the making of certain changes in the Judge's library. Two days later, on September 14, 1936, plaintiffs submitted a proposal to do this work for $687.76 (which included 10 percent overhead and 10 percent profit) and stated:

> In order to expedite the work affected by this change, may we have your telegraphic authorization to proceed with this work. We will be willing to accept this authorization at a price to be determined later, but not to exceed the price named herein, should you not be able to check this estimate immediately.
>
> In connection with this change, there will be a necessary delay and we will therefore present a later claim for extension of time, together with the necessary additional cost due to the necessity of furnishing temporary heat for the additional time.

On September 21, 1936, plaintiffs wired defendant:

> Unless we receive decision our proposal September 14 changes in Judge's library it will be necessary to proceed original contract plan in order to avoid further delay and expense.

On September 25, 1936, plaintiffs wired defendant that "unless decision received this matter by Monday, September 28, will be forced proceed according to original contract plans and file claim for delay and expense due to delay." On the same day, September 25, 1936, defendant, by telegram, ordered plaintiffs to proceed with the work "price deter-

mined later but not exceeding figure named, $687.76, your proposal September 14 additional your construction contract without further modification its terms except time." Also, on the same day, it confirmed such wire by letter, and stated:

> It is noted you state you will present a later claim for extension of time, together with cost for temporary heat for the additional time. On completion of the work, submit your statement for the exact number of days you have been delayed due to the above work, with substantiating data, and the cost for temporary heat if same was necessary.

In accordance with defendant's request of October 19, 1936, for revised proposal, plaintiffs on October 20, 1936, submitted a revised proposal in the amount of $653.76, including 10 percent overhead and 10 percent profit, and claimed a delay of two weeks in connection with this change. It also stated:

> Our contract time should therefore be extended by this amount, and in addition to this extension of time, we will present a later claim for cost of maintaining temporary heat during this additional time.

On November 16, 1936, defendant formally approved the second proposal and granted plaintiffs' request for an extension of contract time of 14 days in accordance with Article 3 of the contract. Plaintiffs' present claim is that the Government took an unreasonable time in accepting plaintiffs' proposal and that they received no compensation for the delay.

The work involved the addition of a partition in the library of the courtroom so as to create a hallway and the addition of two doors and the relocation of one door. This work also included additional electrical wiring and radio outlets. Practically the entire work was confined to this hallway at one end of the library, about 4 feet wide and 30 feet long, and amounted to a minor change or modification of the contract.

Although plaintiffs received notice to proceed with the work September 25, 1936, the work involved in the change was performed practically during 6 days between October 28 and November 6, 1936. Other construction work under

the contract was proceeding regularly with the normal quota of employees working in the building.

13. The eleven days that elapsed between the dates of plaintiffs' proposal and defendant's notice to proceed were not an unreasonable time for defendant to check and consider the proposal, nor were plaintiffs caused material delay thereby.

However, defendant, in accordance with plaintiffs' request, granted an extension of 14 days and paid plaintiffs for furnishing temporary heat for that period.

No appeal was taken by plaintiffs to the head of the department from the decision of the contracting officer.

STRIKE DELAY

14. Plaintiffs' subcontractor received the last models, Nos. 1, 10, and 12, from the modeler on April 27, 1936. On May 9, 1936, a strike occurred at the subcontractor's plant which interfered with fabrication of all limestone for plaintiffs' project, including the models. As a result, limestone shipments to the job stopped and plaintiffs were unable to proceed with setting limestone from May 19. The strike terminated May 27, 1936, and the setting of limestone was resumed on the job June 9, 1936, 20 days after its cessation. Defendant granted an extension of 20 days on account thereof as an unforeseeable event under Article 9 of the contract.

Defendant failed to submit its models within a reasonable time for plaintiffs' operations under the contract, of which it was fully advised. If the models had been submitted by defendant in accordance with plaintiffs' progress chart, or within a reasonable time thereafter, plaintiffs' subcontractor should have been able to fabricate and supply the carvings before the period of the strike at its plant; if so, plaintiffs would not have been caused the delay of 20 days in their operations.

There is no proof that any such delay was a foreseeable consequence of the late receipt of models.

Defendant's contracting officer, in granting plaintiffs an extension of contract time, stated:

> The strike in the stone industry began on May 9, 1936, but the job records show that the work was not sus-

pended on account of the lack of stone until May 19, and that the extent of the time lost was from May 19 to June 9, a period of 20 calendar days. You reported this delay within ten days as required by Article 9 of your contract, and it is substantiated thereunder.

Plaintiffs failed to appeal from the finding and determination of the contracting officer to the head of the department.

ELECTRICAL SIGNAL SYSTEM CHANGE

15. On October 19, 1936, defendant requested plaintiffs to submit a proposal for the installation of an electrical signal system. On November 10, 1936, 22 days later, plaintiffs by letter, submitted a proposal to perform the work included in this proposed change for $519.92 (which included 10 percent profit and 10 percent overhead), and requested defendant's immediate decision by wire on the ground that some parts of the work were then being held up. Again on November 18, 1936, plaintiffs wired the defendant that it was imperative to have the decision immediately. November 20, 1936, being 10 days from the date plaintiffs submitted their proposal, defendant wired plaintiffs to proceed with the work at a price to be determined later, but not exceeding the figure named of $519.92, contained in proposal of November 10, additional to the contract, without further modification of its terms, except time. On the same day the defendant confirmed its wire, advising plaintiffs:

It is noted that you state that there will be a delay in the completion of your contract and you will present a claim later for extension of time, together with the necessary cost due to the necessity of furnishing temporary heat for the additional time. On completion of the work you are requested to forward a statement, through the Engineer, of the exact number of days the project as a whole has been delayed together with substantiation data.

On December 10, 1936, defendant formally notified plaintiffs by letter that the sum of $519.92, proposed by plaintiffs, was approved. By letter dated December 11, 1936, plaintiffs advised defendant that they accepted the order with the understanding that there would be a claim for an ex-

tension of time, together with the necessary cost of furnishing temporary heat presented at a later date. No claim for adjustment or protest was submitted by plaintiffs within 10 days of the order of November 20, 1936.

On March 6, 1937, plaintiffs submitted a claim for extension of time for 10 days, being the time that elapsed from submission of plaintiffs' proposal on November 10 to the date of receiving instructions to proceed on November 20. In this letter plaintiffs state:

* * * * *

> During this period it was necessary to withhold plastering and cement finishes in certain areas affected, and even after the issuance of the instructions to proceed it was necessary to cut and patch other plaster and cement work which had been installed prior to your request for a proposal on this work. The ultimate completion of the entire project was therefore delayed by the amount of time mentioned above.
>
> In connection with our claim for the cost of furnishing temporary heat during the delay, this will be made a part of our claim which we are compiling and as called to your attention in our letter of February 5th.

The work involved in this change consisted in installation of 8 buzzers, push buttons, certain annunciators, and a light. There was a duct system already in place, and the change involved some cutting and patching of floors and walls amounting to $35 and plastering $50. The labor cost was $192, and contractor's profit and overhead $90.94.

The work was performed by plaintiffs' electrical subcontractors, who also had an independent contract for installation of the lighting fixtures in the building, and the work was carried on beginning December 3, 1936, and at irregular intervals thereafter, along with its own work, until completed. No delay of the operations in the building is shown to have occurred.

The work constituted a minor change in the contract. The 10-day interim between plaintiffs' proposal and defendant's order to proceed was a reasonable time for checking and considering plaintiffs' proposal. Plaintiffs had required approximately 20 days from the date defendant requested the proposal before submitting it to defendant.

Plaintiffs were not delayed in their building operations by reason of the time that elapsed between plaintiffs' proposal and defendant's order to proceed.

COUNTER CHANGES AND ACOUSTICAL TILE BASES

16. The plaintiffs waive their claim for damages for changes made in the counters in the deputy clerk's and deputy marshal's offices, and they also waive their claim for damages for a change calling for the installation of certain acoustical tile bases.

DAMAGES

17. As stated, the whole project was completed on February 5, 1937. On that day plaintiffs notified defendant as follows:

> Reference is made to delays suffered by us in the construction of the above, due to changes in the plans and specifications and other causes beyond our control.
> In connection with these delays we are preparing a statement of claim for additional expenses due to the necessity of providing temporary heat and other expenses. This claim will be presented in specific form within the next thirty days.

On March 9, 1937, plaintiffs submitted their claim in the amount of $5,904 for "90 days' temporary heat due to delays caused by Government." This claim includes 5 percent contractor's overhead and 10 percent profit. In their claim it was stated that plaintiff's were delayed by reason of the delay in receiving *models*, the *penthouse changes*, *the strike*, and the changes in the *Judge's library*. On March 23, 1937, defendant advised plaintiffs that their claim was rejected because of decisions of the Comptroller General to the effect that appropriations for the construction of public buildings were not available for the payment of damages resulting from delays on the part of the Government. On March 27, 1937, plaintiffs urged a reconsideration of their claim on the grounds that the additional cost of temporary heat was due to changes in the contract made by the Government and that the excess should "therefore be considered as a change in the contract and not claim for damages." On May 20, 1937, plaintiffs filed a claim "for cost of additional supervision,

which is entirely separate from the * * * claim for temporary heat." This claim was for $4,271.67, including overhead and profit. On July 19, 1937, plaintiffs again submitted a claim for additional expense for temporary heat due to the model delays, which plaintiffs claimed amounted to 80 days, the penthouse changes, the strike, and the changes in the Judge's library, this claim being in the amount of $3,894.85. This claim included "Gen. 10%"—doubtless contractor's overhead and profit. August 11, 1937, defendant replied that the cost for temporary heat would not be allowed for delays in connection with weather, strikes, or delays occasioned by the contractor, and that payment for temporary heat could only be made where the cost of such heat was incidental to changes. It advised plaintiffs to submit a revised proposal for the cost of temporary heat incidental to such changes, such as the 24 days which had been granted to plaintiffs on account of the penthouse changes, and the 14 days on account of the changes in the Judge's library. August 25, 1937, plaintiffs submitted a revised claim for temporary heat covering the period of 38 days in connection with the penthouse and Judge's library changes mentioned by defendant in its letter dated August 11, 1937. This claim was in the amount of $1,565.44, and included 10 percent for overhead and profit. In this letter plaintiffs stated they were submitting such revised claim "without prejudicing our rights to any claim we may file in the future for compensation for additional expenses caused by reason of delays in the work." September 8, 1937, defendant approved plaintiffs' revised proposal of $1,565.44, as set forth in their letter dated August 25, 1937, for temporary heat for a period of 38 days, which included 10 percent for overhead and profit. As to plaintiffs' claim for additional expenses caused by reason of delay, defendant advised that there was no provision under the terms of the contract that permitted payment for delays. October 7, 1937, plaintiffs signed the final voucher and notified defendant that "in signing this voucher, we are doing so without prejudice to any rights we may have to file claim for damages and expense due to delays caused by the Government." October 13, 1937, plaintiffs notified defendant that they were accepting its final check "under protest,"

and submitted a claim in the amount of $6,375.39 for additional expenses incurred by reason of delays which they claimed were caused by the Government. This claim included 10 percent overhead and 10 percent profit. October 26, 1937, defendant advised plaintiffs "* * * no reason appears for any change in the previous decisions to the effect that the obligations of the Government in connection with changes in the contract requirements are considered to have been liquidated by the acceptance of your proposals therefor, and that the appropriation for the work is not available for the payment of damages resulting from other alleged delays."

18. The defendant delayed plaintiffs a total of 32 days. Their daily costs during this period, exclusive of central office overhead, were as follows:

	Per day	
Field Staff Overhead	$28.19	
Workmen's Compensation Ins. Social Security Tax Public Liability Ins.	.55	
Fire Insurance	1.26	
Telephone and Telegraph	2.35	
Photographs	.14	
Traveling expenses	.65	
Electricity	2.39	
Total	35.53	
Total costs, exclusive of central office overhead, for 32 days, at $35.53 per day		$1,136.96
Central Office Overhead		750.00
Total		1,886.96

The court decided that the plaintiffs were entitled to recover for 32 days delay for which the Government was responsible, including office overhead.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs entered into a contract with the defendant for the construction of a Post Office and Court House at Wilmington, Delaware. They sue the defendant for damages for delays caused by (1) failure to furnish models on time; (2) changes made in penthouses and a coping; (3) changes

made in the Judge's library; (4) on account of a strike; (5) changes necessary to install an electrical signal system; (6) changes in the counters in the deputy clerk's and deputy marshal's offices; and (7) changes to provide for an acoustical tile base in certain of the rooms.

1. *Delay due to failure to furnish models on time.*—The plans and specifications called for the erection of eleven limestone ornamental carvings at various points on the exterior of the building. The models for these carvings were prepared by an independent contractor. After the architects for the building had prepared details for the models, the independent contractor moulded them in clay and photographed them. After the photographs had been approved by the architects and the Treasury Department the models were then cast in plaster and were photographed and, after approval, were shipped to plaintiffs' subcontractor in Indiana, who constructed the ornamental carvings according to them.

According to plaintiffs' progress schedule, 2 of these 11 models were required to be in the hands of their subcontractor on December 10, 1935, and 4 on December 15, 1935, but these 6 models were not received by the subcontractor until February 28, 1936. Plaintiffs originally claimed damages for this 80 days of delay; however, in their brief they reduce this claim to 44 days. The contracting officer found that plaintiffs had been delayed 32 days and extended the time for completion of the contract accordingly. The defendant in its brief admits that there was some delay, but says that the proof does not show the extent of it. It suggests that the delay could not have been more than 19 days.

The commissioner finds that defendant was not responsible for the entire 80 days' delay. He finds that plaintiffs were considerably delayed in the first few months of the contract by tardy delivery of structural steel, brick, tile, waterproofing, granite, and on account of unsatisfactory metal forms, and by unusually severe weather. The result of this was that by the end of December, when the 6 models should have been in the hands of the subcontractor, only 18.4 percent of the work had been completed, whereas 35 percent should have been completed.

He also finds that plaintiffs did not begin the setting of limestone until March 24, 1936, whereas, according to their schedule, all of it should have been set between December 23 and March 15; and he finds that they were not ready for the carvings until April 30, 1936. These findings are not disputed and are amply supported by the testimony.

Inasmuch as plaintiffs were not ready for the 6 carvings, the models for which were furnished on February 28, 1936, until April 30, 1936, it would appear that plaintiffs had not been delayed at all due to the tardy furnishing of these 6 models, since plaintiffs had notified the defendant that only 2 months would be required to construct the carvings after the models had been received. However, the commissioner does find that some ornamental carvings were not on hand when plaintiffs were ready for them, and he finds that the defendant was responsible for this delay, whatever the extent of it may have been. He also finds that it took plaintiffs 146 days to do the limestone work, whereas their progress schedule had allowed 83 days therefor.

For how much of this 63 days' delay the defendant was responsible is exceedingly difficult to determine from the proof. As stated above, the defendant says that this could not have exceeded 19 days, but the contracting officer found that the delay had been 32 days.

It is true that we are not bound by the findings of the contracting officer in a claim for damages due to delay (*Langevin* v. *United States*, 100 C. Cls. 15), but there is a strong presumption that the delay was not less than that found. The contracting officer, or his representative, had day to day contact with the work and was in the best position of anyone, except the contractor, to know the extent of the delay. He is supposed to weigh the facts with an even hand before rendering his decision; but it cannot be overlooked that he is the defendant's selection and its own employee. He is not apt to err on the side of the contractor and against his employer, whose interests he is employed to guard and protect. Unless the clear weight of the evidence shows the delay was less than that found by him, we think the defendant is bound by his finding. His finding in this case is not contrary to the weight of the evidence.

On the other hand, the plaintiffs evidently were satisfied with the finding because they took no appeal from it to the head of the department.

We hold, therefore, that plaintiffs are entitled to recover from the defendant damages for 32 days' delay in the furnishing of the models.

2. *Delay due to penthouses and coping changes.*—The contract called for two penthouses on top of the third story for housing the elevator machinery. These were to be faced with brick; but in November 1935 defendant notified plaintiffs that it desired to change this facing to limestone with a brick backing, and requested a proposal for doing the work as changed. This proposal was submitted on November 22, 1935, in the sum of $1,534.50. Plaintiffs were notified that it was considered excessive and subsequently they submitted several revised proposals, including one on April 3, 1936, for $2,567, which included 10 percent overhead and 10 percent profit, and an amount of $600 for "additional job administrative expense due to delays." They were notified that the contracting officer was without authority to approve any charge for overhead other than overhead incident to the extra work ordered. On April 8, 1936, the plaintiffs were ordered to proceed with the changes, subject to a later determination of the price. Drawings for the changes had been transmitted to plaintiffs previously on March 28, 1936. Finally on April 13, 1936, plaintiffs submitted a proposal of $1,529.58, which was accepted.

Plaintiffs claim that the defendant's delay in making up its mind as to the change it wanted was unreasonable and that they were delayed thereby for 30 days to their consequent damage. The contracting officer extended plaintiffs' contract time 24 days on account of the delay.

It is questionable whether or not the plaintiffs were delayed at all on account of this change. The commissioner finds that the plaintiffs could have begun work on the penthouses on April 12, 1936, but the evidence shows that even though they had had the stone on hand at that time they probably would not have done so. As we stated in discussing

the delays due to the furnishing of the models, plaintiffs did not begin their limestone work until March 24, 1936. This work, of course, begins at the bottom of the building and works up. It is not reasonable to suppose that plaintiffs would have done the limestone work on the penthouses on the top of the building prior to the time they had done the stone work below this point. As a matter of fact, plaintiffs did not begin the stone work on the penthouses until July 2, 1936, three months after the drawings had been received.

But whether or not the plaintiffs were in fact delayed by this change in plan, as the contracting officer has found, we are satisfied that under all the circumstances the delay in deciding upon the change was not unreasonable. Unless it was unreasonable, the plaintiffs are not entitled to recover. *Magoba Construction Co.* v. *United States*, 99 C. Cls. 662, 690; *Silberblatt & Lasker, Inc.* v. *United States*, No. 45302, decided February 7, 1944 (*Ante*, page 54).

The defendant knew that plaintiffs were behind their schedule and would not be ready to begin the limestone work when they had originally contemplated doing so. It knew that they did not begin this work, in fact, until March 24, and it knew that this work began at the bottom of the building and worked upwards. Plaintiffs' progress schedule showed that they contemplated taking 83 days to do the limestone work. Having begun the limestone work on March 24, according to their schedule they would not have completed it until June 15. Therefore, they would not have been ready for the limestone for the penthouses until about the first of June. The plans were transmitted to plaintiffs two months earlier, giving ample time for its fabrication and delivery to the job by the time plaintiffs in ordinary course would have been ready for it. As a matter of fact, the setting of the limestone on the penthouses did not begin, as stated, until July 2, 1936, three months after the plans had been received.

Defendant, therefore, had a right to assume that its delay in deciding on this change would work no hardship on plaintiffs. Under these circumstances, we think that defendant's

delay in submitting plans for this change was not unreasonable and, hence, plaintiffs are not entitled to recover on this item.

3. *Judge's library change.*—On September 12, 1936, defendant requested plaintiffs to submit a proposal for making certain changes in the Judge's library. This involved cutting off a portion of the library in order to make a hallway, and the addition of two doors, and the relocation of another one, and certain additional electrical wiring and radio outlets. On September 14, 1936, plaintiffs submitted a proposal of $687.76 to do the work. On September 25 the defendant ordered plaintiffs to proceed with the work, subject to a later determination of the price, but not to exceed the amount of their proposal. Later the proposal was reduced to $653.76, and was approved. This was a minor change; it was performed in 6 days. It could not have seriously delayed the final completion of the work. Work had to stop in this particular part of the building, but the commissioner's report shows that other construction work under the contract proceeded regularly with the normal quota of employees. This being the known situation, there was no great rush in ordering the exact change desired.

When it is considered that the change had to be approved by the private architects, and approved by the supervising architect, and, since it involved more than $500, by the head of the department, and since it was a minor change which could not have seriously interfered with the progress of the whole work, we think that 11 days was not an unreasonable time to take to issue the actual order to proceed. Although this order was issued on September 25, plaintiffs did not begin work on the change until a month later, on October 28.

Plaintiffs are not entitled to recover on this item.

4. *Strike delay.*—Plaintiffs' subcontractor did not receive the last models for the carvings until April 27, 1936. Before the carvings could be fabricated a strike occurred at the subcontractor's plant, which delayed all limestone work from May 19 until June 9, a period of 20 days. The plaintiffs requested, and the contracting officer granted, an extension of

time of 20 days on account thereof. In plaintiffs' petition they seek damages for this 20 days of delay. The commissioner in computing the total delay for which plaintiffs are entitled to recover omits this 20 days. We think this was proper. *Young-Fehlhaber Pile Co.* v. *United States*, 90 C. Cls. 4, 16.

Plaintiffs are not entitled to recover on this item.

5. *Electrical signal system change.*—On October 19, 1936, defendant requested plaintiffs to submit a proposal for the installation of an electrical signal system consisting of 8 buzzers, push buttons, certain annunciators, and a light. Twenty-two days later plaintiffs submitted a proposal of $519.92 for doing the work, which was later accepted by the defendant. Ten days after the proposal was received plaintiffs were directed to proceed with the work at a price to be determined later.

Later on plaintiffs claimed an extension of time of 10 days for the performance of the contract on account of this change, but this claim was not acted upon by the contracting officer, and plaintiffs did not pursue the matter further.

We are of opinion that the 10 days which the defendant took to check plaintiffs' proposal was not an unreasonable time under all the circumstances, for the reasons stated in the discussion of the Judge's library change.

Nor are we satisfied that the plaintiffs in fact were delayed by this change. The commissioner has found that they were not delayed, and the plaintiffs in their exception to the finding point to no proof indicating that it is erroneous. Rule 46 of this court reads in part: "Each exception, at the end thereof, shall have appropriate references to the parts of the record relied upon for its support."

Plaintiffs are not entitled to recover on this item.

6. *Changes in counters and acoustical tile bases.*—The commissioner finds that the plaintiffs were not delayed by either one of these changes, and plaintiffs took no exception thereto. Indeed they say in their brief they do not press these claims.

Plaintiffs are not entitled to recover on them.

Opinion of the Court

7. *Damages*.—The commissioner tabulates plaintiffs' costs for a period of 70 days' delay as follows:

Field Staff Overhead, at $17.56 per day		$1,229.20
Workmen's Compensation Ins. Social Security Tax Public Liability Ins. } at 41¢		28.70
Fire Insurance, at $1.26 per day		88.20
Telephone & Telegraph, at $2.35 per day		164.50
Photographs, at 14¢ per day		9.80
Traveling Expenses, at 65¢ per day		45.50
Electricity, at $2.39 per day		167.30
		1,733.20
Office Overhead, 10%		173.32
		1,906.52
Temporary heat, at $33.70	$2,359.00	
Office overhead, 10%	235.90	
	2,594.90	
Less amount paid to plaintiffs by defendant for temporary heat, including 10% overhead	1,563.44	1,031.46
Total		2,937.98

We think the commissioner's daily rates for fire insurance, telephone and telegraph, photographs, traveling expenses, and electricity are correct, but we think the daily rate for field staff overhead should be $28.19, instead of $17.56, as the commissioner finds. The commissioner excluded from the field staff overhead the amount paid Engineer Mathis, apparently because Mathis left the job long before it was completed. However, the testimony shows that he was on the job throughout the period of delay due to the failure to furnish on time the models for the ornamental carvings, and for some considerable time thereafter. For the period the work was delayed on this account, therefore, plaintiffs incurred additional costs on account of his salary. This was $5.71 per day. Assistant Superintendent Bateson was also on the job throughout this period of delay, and for some considerable time thereafter, and his daily salary for each day thereof also should be included. This was $7.14 per day.

The commissioner having made no allowance for Assistant Superintendent Bateson, of course did not include the

workmen's compensation insurance paid on account of his salary. This amounted to 10 cents per day. Nor, for the same reason, did he include the social security taxes paid on account of Engineer Mathis. This amounted to 4 cents per day. Therefore, the costs for workmen's compensation insurance, social security taxes, and public liability insurance should have been at the rate of 55 cents a day, instead of 41 cents a day, as found by the commissioner.

The commissioner allows $173.32 for central office overhead, being 10 percent of the total cost for field staff overhead, workmen's compensation insurance, social security tax, public liability insurance, fire insurance, telephone and telegraph, photographs, traveling expenses, and electricity. We think this is improper.

Where the defendant orders extra work to be done, it is customary to add to the cost of the labor and material necessary to do the extra work 10 percent for field and central office overhead. This is the proper procedure in such cases. But here there was no additional expenditure for extra work.

It is exceedingly difficult to determine from the testimony the extent of plaintiffs' damage in this case on account of central office overhead. No rule has been found that can be satisfactorily applied under the facts of this case; but taking all the facts and circumstances into consideration, we find and adjudge that plaintiffs have been damaged in this respect in the total sum of $750.00.

Plaintiffs' daily costs during the period of 32 days' delay, exclusive of central office overhead, were as follows:

	Per day	
Field Staff Overhead	$28.19	
Workmen's Compensation Ins. Social Security Tax Public Liability Ins.	.55	
Fire Insurance	1.26	
Telephone and Telegraph	2.35	
Photographs	.14	
Traveling Expenses	.65	
Electricity	2.39	
Total	35.53	
Total cost for 32 days @ $35.53 per day		$1,136.96
Central office overhead		750.00
Total		1,886.96

~~No allowance is made for temporary heat. The findings show the contracting officer allowed plaintiffs temporary heat for the 38 days' delay due to the changes in the penthouses and the Judge's library. We have held that plaintiffs are not entitled to damages for the delay due to these changes. Plaintiffs, therefore, have already been paid more than the amount to which they are entitled for temporary heat and, hence, no further allowance therefor is made.~~

~~Plaintiffs, therefore, are entitled to recover for the 32 days' delay $1,886.96. Judgment for this amount will be entered. It is so ordered.~~

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ON MOTION FOR NEW TRIAL

June 5, 1944

On plaintiffs' motion for new trial, which was allowed by the Court June 5, 1944, the judgment for plaintiffs which was entered April 3, 1944, was withdrawn and set aside, and in lieu thereof a new judgment for plaintiffs was entered in the sum of $2,965.36.

A memorandum opinion by Whitaker, *Judge*, was filed June 5, 1944, as follows:

In their motion for a new trial plaintiffs say we erred in making no allowance for temporary heat for the 32 days of delay for which we held the defendant responsible. We disallowed any amount for temporary heat for this time due to the fact that the defendant had allowed plaintiffs temporary heat for two periods of delay, one of 24 days due to a change in the penthouses, and one of 14 days due to a change in the Judge's library. Since we held the defendant was not responsible in damages for these delays, we held that the amount allowed for temporary heat for these two periods of delay should be offset against what plaintiffs were entitled to for temporary heat for 32 days' delay for which we held defendant was responsible.

Plaintiffs point out that the allowance of temporary heat

for the two periods of delay of 24 days and 14 days was not an allowance of damages for defendant's wrongful act in causing these delays, but was for an item of additional cost incident to the change made in the penthouses, involving, in the opinion of the contracting officer, a delay of 24 days, and in the changes in the Judge's library involving, in the opinion of the contracting officer, a delay of 14 days.

We think plaintiffs are correct. The contracting officer advised plaintiffs that payment for temporary heat could be made only where the cost of such heat was incidental to changes, and that he had no authority to allow a claim for damages (finding 17). It, therefore, appears that the allowance was for extra cost incident to the changes, and was not an allowance for damages for defendant's alleged wrongful conduct. It was, therefore, improper for us to offset against plaintiffs' claim for temporary heat for the 32 days, for which we held the defendant liable, the amount that had been allowed plaintiffs for temporary heat due to the changes in the penthouses and the change in the Judge's library. For these 32 days of temporary heat the plaintiffs are entitled to recover the amount of $1,078.40.

Plaintiffs' motion for a new trial is granted and the judgment heretofore entered of $1,886.96 is withdrawn and set aside, and in lieu thereof a judgment will now be entered in favor of the plaintiffs and against defendant in the amount of two thousand, nine hundred sixty-five dollars and thirty-six cents ($2,965.36).

AKTIEBOLAGET IMO-INDUSTRI v. THE UNITED STATES

[No. 45689. Decided April 3, 1944]*

On the Proofs

Jurisdiction; suit by alien under Section 155 of the Judicial Code not permitted unless reciprocal right is shown.—Under the provisions of Section 155 of the Judicial Code (U. S. Code, Title 28, section 261) which provides that "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting

*Plaintiff's motion for new trial overruled June 5, 1944.

claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction"; it is *held* that the burden of showing that this condition precedent to jurisdiction exists rests upon the alien claimant.

Same; jurisdictional specifications assumed.—Section 155 of the Judicial Code (U. S. Code, Title 28, section 261) assumes that the alien's claim is one which satisfies the jurisdictional specifications of the statute defining the jurisdiction of the Court of Claims as "to subject matter and character."

Same; Section 145 of the Judicial Code is limited by Section 155.—Section 155 of the Judicial Code (U. S. Code, Title 28, section 261) denies to an alien, who does not show the reciprocal right to sue in the courts of his country, consent to sue on any claim in the Court of Claims unless the statute (Section 145 of the Judicial Code; U. S. Code, Title 28, section 250) consenting to the suit on his particular type of claim is interpreted as not being limited by Section 155. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, distinguished. *Choremi* v. *United States*, 28 Fed. (2d) 913, cited.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, Aktiebolaget Imo-Industri (usually referred to in the documentary evidence herein as "IMO"), is a corporation organized and existing under the laws of the Kingdom of Sweden with offices and principal place of business at Stockholm, Sweden. It maintains no office or place of business in the United States, and is not engaged in a trade or business in the United States.

2. The tax in controversy amounts to $1,650 and was assessed and collected under the provisions of Section 144 of the Revenue Act of 1938 on $11,000 paid to the plaintiff during the year 1938 by Pittsburgh Equitable Meter Company under the provisions of a license agreement and negotiations leading up to the execution of that agreement, dated April 1, 1938.

3. The tax of $1,650, together with $21.93 accrued as interest thereon, was paid by the Pittsburgh Company on the 7th day of September 1939, but not having been withheld by it at the time it made the payment of $11,000 to plaintiff under the agreement, the amount of the tax was refunded to the Pittsburgh Company by plaintiff on or about October 6, 1939, and on or about November 2, 1940, plaintiff filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania, a claim for the refund of the tax and interest. The claim for refund was rejected by the Commissioner of Internal Revenue on or about September 20, 1941, and this suit was filed on May 28, 1942.

4. The agreement of April 1, 1938, provided for the sole and exclusive right and license by the Pittsburgh Company during the continuance of the agreement, to manufacture, use, and sell in the United States of America and its possessions all types and sizes of meters for measuring all kinds of liquids embodied in inventions owned by the plaintiff. It provided, among other things, that the license therein granted was subject to the restrictions and conditions therein set forth. Except as otherwise provided therein the agreement was to continue in full force and effect until May 4, 1954. The Pittsburgh Company was given the right to cancel the agreement upon three months' previous written notice to plaintiff, to take effect as of the end of the second contract year, or thereafter at the end of any following contract year, if in the opinion of the Pittsburgh company it became no longer profitable to manufacture and sell meters manufactured under plaintiff's patent. By agreement of the parties the contract might continue beyond May 4, 1954.

5. The pertinent portions of the agreement are as follows:

> 1. IMO hereby grant to PEMCO the full, sole, and exclusive right and license, during the continuance of this agreement, to manufacture, sell, and use in the United States of America and its possessions all types and sizes of meters (including composite parts and spare parts) for measuring all kinds of liquids embodying the inventions, or any of them, disclosed and covered in the U. S. Patents enumerated in Schedule A, together with

all improvements embodying said subject matter which IMO may discover or acquire (whether the same shall be patented or not, during the continuance of this agreement; this license being subject to the restrictions and conditions hereinbelow set forth.

2. PEMCO is also hereby licensed by IMO to use the trade name or mark "IMO" either alone or in combination with the trade names PEMCO, EMCO or any other trade name or trade-marks of the Pittsburgh Equitable Meter Company, this trade-mark license to run concurrently with the patent license of paragraph 1; and PEMCO hereby agrees that the mark IMO or the combined mark shall be affixed to all IMO meters manufactured by PEMCO or its sublicensees hereunder; it being understood and agreed that the mark IMO is and shall remain the property of IMO, and that PEMCO and sublicensees shall assign all trade rights therein to IMO on termination of license or sublicense.

3. It is understood and agreed that PEMCO shall, during the continuance of and under this license, have the nonexclusive right to export IMO meters from the United States into any country wherein IMO has not secured patent protection covering such exported meters; subject to the payment of the same royalty thereon as on meters made or sold for the U. S. market; and for the purposes hereof IMO agrees to give reasonably prompt notice to PEMCO of all relevant patents hereafter granted to it or its representatives or licensees in foreign countries.

6. IMO hereby grants to PEMCO the right to grant sublicenses to manufacture and sell in the United States IMO meters and composite and spare parts in accordance with this agreement; and PEMCO hereby agrees to inform IMO immediately of any and all such sublicense agreements, and to furnish a full copy of each thereof, giving the address of each sublicensee; and it is understood and agreed as to such sublicensees as follows; (a) they shall be no less restrictive than this license, (b) they shall carry sublicense royalties no lower than this license, (c) sublicensee reports shall be rendered in duplicate, one copy each to IMO and PEMCO, (d) both PEMCO and each sublicensee shall be responsible to IMO for full performance by sublicensees, (e) sublicenses shall be specified to terminate upon the termination of this license subject to continuance at the will of IMO, and (f) this paragraph is subject to all restrictions and conditions hereinbelow set forth.

17. By way of consideration for the granting of license to PEMCO by this agreement, PEMCO hereby agrees to pay IMO a royalty at the rates given in Paragraph 18 on the entire turn-over or gross sales price in the sale or other disposal, in the United States or by export, of all meters and composite parts and spare parts manufactured or sold by PEMCO and/or any of its sublicensees under said patents. In the case of an IMO meter which is sold as a part of compound meter, or any other equipment, the usual sales price of the IMO meter alone shall decide the royalty payable; but if the price of this IMO meter cannot be ascertained, then the royalty shall be based upon the price of the largest IMO meter constructed with a capacity no greater than such compound meter. A meter is to be considered sold when it has been invoiced to the customer, or if not invoiced when it has been shipped or placed in the custody of a common carrier or agent for the customer. The entire turn-over aforesaid is to be taken as the entire or gross sales prices of meters, etc.; from these however PEMCO may deduct an allowance for expenses, such as packing, carriage, duty, commissions, recovery costs, and stamps. This allowance or deduction from gross sales prices shall for all water meters be calculated as a flat 33⅓%, and the schedule of royalty specified in paragraph 18 shall therefore be based upon 66⅔% of the gross turn-over thereof, whether sold or exported by PEMCO or its sublicensees. For oil meters and all except water meters the royalties shall be calculated upon the entire sales prices after deducting a 10% allowance for expenses such as packing, freight, duty, and commissions. However, it is especially agreed, as to PEMCO but not sublicensees, in consideration of the down payments stipulated in paragraph 21, PEMCO shall not have to pay any royalties for sales made in the United States during the first two years of this agreement.

21. As an assurance that PEMCO will make every endeavor to proceed with and expedite the manufacture and sale of IMO meters, PEMCO hereby agrees to pay IMO the following advance payments:

(a) At the time of the signing of this agreement for the territory of the United States and its possessions ---------------------------------- dollars-- $12,000
(b) On the day when PEMCO gives notice to IMO that PEMCO elects to use the right according to paragraph 5 for the territory of Canada---- dollars-- 3,000
(c) Same, for the territory of Mexico--------- dollars-- 3,000

And for assurance of continued promotion of the business PEMCO guarantees further yearly payments of royalties amounting to the following minima:

	For United States and its possessions	For each of Mexico and Canada
For the third year .... Dollars..	$5,000	None
For the fourth year .... do....	7,000	$500
For the fifth year .... do....	9,000	1,000
For the sixth year .... do....	10,000	1,500
For the seventh and succeeding years .... do....	10,000	2,000

And PEMCO agrees that when the royalties reported and paid for any year fall short of the minima thus specified, it shall within one month after the end of such year pay to IMO the deficiency or amount necessary to make up the full amount of such minimum royalty.

6. Negotiations for the agreement were initiated by R. W. Cramer, of R. W. Cramer & Company, Inc., of 67 Irving Place, New York City, N. Y., an independent manufacturer's agent or broker, by a letter of September 4, 1935, addressed to Willard Rockwell, President, Pittsburgh Equitable Meter Company, and when it was finally agreed in March 1938 that the Pittsburgh Company would pay the amount of $12,000 for rights covered by the license agreement, it was instructed by plaintiff to pay $1,000 of said amount to R. W. Cramer & Company, Inc., as commissions, and pay the balance to plaintiff.

7. For the first two years of the license agreement of April 1, 1938, the Pittsburgh Company possessed the right to manufacture, use, and sell meters in the United States without further payment to the plaintiff in regard to the meters manufacured, used, or sold; but after the end of the first two years of the agreement specific royalties on the meters manufactured and sold by the Pittsburgh company were payable, and for the third and subsequent years of the agreement, minimum royalty payments were provided for.

8. The Pittsburgh company acquired, by the agreement of April 1, 1938, the exclusive right to the use of the inventions in the United States for a period of ten years if it elected to continue to manufacture, use, and sell the meters produced under said inventions after the second year of the agreement.

9. The agreement of April 1, 1938, was executed by plaintiff at its domiciliary office and place of business in Stockholm, Sweden, and the preliminary agreement for such license agreement, signed by R. W. Cramer, was authorized by radiogram from plaintiff of March 21, 1938, and the preliminary agreement thus signed by R. W. Cramer was subject to acceptance by plaintiff in Sweden. The final agreement of April 1, 1938, was first signed in duplicate by plaintiff in Sweden, and thereafter one copy was signed by the Pittsburgh company at Pittsburgh and returned to plaintiff.

10. The tax involved in this proceeding was exacted by the United States upon the theory that the amount of $11,000 paid plaintiff by the Pittsburgh company, as provided in the agreement of April 1, 1938, was in the nature of a royalty payment for the right to manufacture, use, and sell meters under the inventions of plaintiff. Plaintiff's contention is that the $11,000 was consideration for the assignment of a property right or interest in the patents.

11. It has not been proved that the Kingdom of Sweden accords to citizens of the United States the right to prosecute claims against the Kingdom of Sweden in the courts of Sweden.

The court concluded as a matter of law that it had no jurisdiction to decide this case, and the petition of plaintiff was dismissed.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a Swedish corporation, made an agreement with the Pittsburgh Equitable Meter Company whereby the latter company was given the privilege of using the plaintiff's patents in the manufacture of meters. The Pittsburgh company paid $11,000 to the plaintiff for this privilege for the first two years of the arrangement, and was to pay, if it did not cancel the arrangement, royalties at a specified rate per meter thereafter. The Commissioner of Internal Revenue took the position that the $11,000 paid was a royalty payment, from which the American payer should have withheld a tax of $1,650 as required by Sections 119 (a) (4), 143 (b), and 144 of the Revenue Act of 1938, 52 Stat. 447. It

collected the $1,650 from the Pittsburgh company, which was reimbursed by the plaintiff.

The plaintiff, asserting that its transaction with the Pittsburgh company constituted an assignment or sale of a part of its patent rights which were incorporeal property situated in Sweden, and that upon that transaction no tax to the United States was due, filed a timely claim for refund, which was rejected. This suit followed.

Since the plaintiff is a corporation formed under the laws of the Kingdom of Sweden, Section 155 of the Judicial Code, 36 Stat. 1139, 28 U. S. C. 261, seems to be applicable. That section says:

> Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

We think the plaintiff has the burden of showing that this apparent condition precedent to jurisdiction exists. It has made no such showing. Instead, it urges that Section 155 is not applicable, since Section 145 of the Judicial Code, 36 Stat. 1137, 28 U. S. C. 250, confers jurisdiction upon the court to hear and determine, *inter alia*, claims founded upon "any law of Congress," and a claim for the refund of taxes illegally collected is such a claim. But Section 155 assumes that the alien's claim is one which satisfies the jurisdictional specifications of the statute defining the jurisdiction of the court as to "subject matter and character." We think that Section 155 denies consent to an alien, who does not show the reciprocal right to sue in the courts of his country, to sue on any claim in this court, unless the statute consenting to the suit on his particular type of claim is interpreted as not being qualified by Section 155. In the case of *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, the court construed the act of June 15, 1917, which provided for wartime expropriation of ships and for just compensation to be recovered in this court as not being qualified by Section 155. It was guided to that construction by the fact that the 1917 act provided a procedural method of fulfilling the

requirement of the Fifth Amendment that "just compensation" be made to the owner, whether citizen or alien, when his property is expropriated for public use. We could not give that construction to the provision of the statute giving us jurisdiction over claims "founded upon * * * any law of Congress," Judicial Code, Section 145, 28 U. S. C. 250, under which provision the plaintiff is suing, without substantially nullifying Section 155. *Choremi* v. *United States*, 28 F. (2d) 913.

We conclude, therefore, that the evidence fails to show that we have jurisdiction, and that the petition must be dismissed.

It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge;* and LITTLETON, *Judge*, took no part in the decision of this case.

EDWARD J. DOYLE v. THE UNITED STATES

[No. 45345. Decided March 6, 1944]

On the Proofs

Pay and allowances; value of inadequate quarters may not be deducted.—Following the decision in *Mumma* v. *United States*, 99 C. Cls. 261, value of quarters assigned to Army officer, which are inadequate for officer of his rank, may not be deducted from the amount due for rental and subsistence allowance on account of dependent mother.

The Reporter's statement of the case:

Mr. John W. Gaskins, for the plaintiff. *Mr. Fred W. Shields* and *King & King* were on the brief.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Edward J. Doyle, on June 14, 1937, accepted appointment as a first lieutenant, Medical Section, Officers Reserve Corps, which appointment he retained until July 29, 1939, when it was vacated by his acceptance of an appointment as first lieutenant, Medical Corps, United States

Army, with rank from that date. He accepted appointment as a captain on September 9, 1940, and has served continuously on active duty since July 29, 1939. He is a bachelor officer.

2. Plaintiff's father died in 1929. His entire estate, consisting of a double brick house and a single frame house on Jefferson Avenue, Columbus, Ohio; $2,000 in insurance, and five (5) shares of the common stock of the Pennsylvania Railroad Company, was left to his widow, plaintiff's mother.

3. Plaintiff's mother, Catherine Elizabeth Doyle, died on July 11, 1941, at the age of fifty-seven years. She retained the houses on Jefferson Avenue, left to her by her late husband, until about 1939, at which time she sold them to her eldest son, Joseph, for $4,500, payment of an existing mortgage on the property of approximately $2,500 also being assumed by him. He paid her $1,000 in cash and $50 a month on the balance of the purchase price.

The property was then badly in need of repairs, and the son purchased it from his mother, as she was unable to finance the necessary repairs.

4. Plaintiff's mother, after selling the Jefferson Avenue property, purchased a home at 222 Torrence Road, Columbus, Ohio, in which she lived until her death. The home cost $6,500, and she made a substantial down payment on it, using for that purpose the $1,000 paid to her for the Jefferson Avenue property, some of the money she had previously borrowed against the Jefferson Avenue property, and a part of the insurance left her by her late husband. The balance of the purchase price was payable at the rate of $35 a month.

5. At the time of plaintiff's mother's death she owned no other real property, and the only income-producing personal property owned by her was the five (5) shares of stock in the Pennsylvania Railroad Company, from which she realized an income of about $1.50 a year. She bequeathed all of her property to her daughter Mary.

She never held any gainful employment.

6. Plaintiff's mother had five sons and a daughter besides the plaintiff. The eldest son, Joseph, was thirty-one years of age at the time he testified in this case and employed as a

fireman by the City of Columbus. The other sons, James, Bernard, Francis and William were 27, 26, 24 and 17 years of age, respectively. James was married and employed as a clerk; Bernard was unmarried, in poor health, and employed only intermittently; Francis was married and had two children, and William was unmarried and attending school. The daughter, Mary, was fifteen years of age and attending high school.

7. Joseph lived with his mother until his marriage on October 19, 1940, and he and his wife again lived with his mother from May 1941 to the date of her death. Prior to his marriage, he paid his mother $40 a month for his room and board, which represented the fair value of the room and board, and thereafter he contributed $10 a month to her, but he and his wife paid no room and board after May 1941. His wife, however, gave up her employment in order to take care of his mother at that time.

Bernard, William and Mary lived with their mother during the period from July 29, 1939, to the date of her death. Bernard paid $15 or $20 a month for his room and board when employed, but was unemployed most of the time. William and Mary paid no room and board.

James and Francis did not at any time after July 29, 1939, contribute anything towards the support of their mother.

8. The household living expenses of plaintiff's mother and the children living with her amounted to approximately $112 a month and consisted of the following items: Electricity, $9; gas, $4; payments on house, $35; taxes, $5; water, $1.50; fuel for heating, $7.50 or $8, and groceries, $50. Her personal items of living expenses are not known with the exception of $5 to $10 a month which she spent for medical and dental services. The total of her household and personal expenses was estimated by her son Joseph to be $150 or $160 a month.

9. The plaintiff contributed $100 a month to his mother during the period from July 29, 1939, to about January 1941, when his contribution was increased to about $150 a month, and continued until her death on July 11, 1941. His contributions were made by check or money order.

During the period from July 29, 1939, to July 11, 1941, the

mother's only source of income, other than plaintiff's contributions to her, was the $50 paid to her by her son Joseph on the Jefferson Avenue property, the $40 paid by him for his room and board until October 1940, the $10 a month thereafter contributed by him, the $15 to $20 occasionally contributed by her son Bernard in payment of his room and board, and the $1.50 annual income from her stock.

10. During the period from August 12, 1939, to September 7, 1939, plaintiff was assigned as quarters at his permanent station at Plattsburg Barracks, New York, one room in the officers' club annex, and from September 8, 1939, to August 30, 1940, he was assigned as quarters two rooms at the same station. He occupied these quarters for about three months and then was ordered to duty at Fort Benning, Georgia, where he remained for about seven months, during which time he paid rent on the quarters furnished him. He was not assigned any quarters during the period from September 1, 1940, to July 11, 1941.

11. Plaintiff made claim for increased rental and subsistence allowances on account of a dependent mother, which was disallowed by the General Accounting Office.

12. Computations have been made by the Comptroller General of the United States. These computations show that if plaintiff is entitled to increased rental and subsistence allowances on account of a dependent mother, there is due him the sum of $518.67, representing the difference in the rental and subsistence allowances paid or credited to him as a bachelor officer, and the rental and subsistence allowances of an officer of his rank and length of service, with a dependent, as computed by the General Accounting Office for the period from July 29, 1939, to August 30, 1940.

These computations are based on a deduction from the amount otherwise due plaintiff of the value of the quarters furnished him at Plattsburg Barracks from August 12, 1939, to August 30, 1940, irrespective of the fact that they were inadequate for an officer with a dependent.

13. Plaintiff's mother was dependent upon him for her chief support from July 29, 1939, to the date of her death on July 11, 1941.

Plaintiff's claim is a continuing one to July 11, 1941.

Syllabus

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

Plaintiff's mother was dependent upon him for her support from July 29, 1939, to the date of her death on July 11, 1941, and plaintiff, therefore, is entitled to recover under numerous decisions of this court.

In the computation of the amount due on the assumption that plaintiff's mother was dependent upon him, the Comptroller General has deducted the value of the quarters occupied by plaintiff, but these have been found to be inadequate, and the deduction, therefore, is improper. *Mumma v. United States*, 99 C. Cls. 261.

Plaintiff is entitled to recover, but entry of judgment will be suspended until the incoming of a report from the General Accounting Office showing the amount due computed in accordance with this opinion. It is so ordered.

In accordance with the above opinion, and upon a report from the General Accounting Office showing the amount due thereunder, and upon motion for judgment by plaintiff, judgment was entered for the plaintiff in the sum of $1,716.07 on May 1, 1944.

RAY RIETHMILLER v. THE UNITED STATES

[No. 44381. Decided May 1, 1944]

On the Proofs

Jurisdiction under the Act of June 25, 1938; limitation upon filing of claims for increased labor costs under the N. I. R. A. Act.—Under the provisions of the Act of June 25, 1938, and of the Act of June 16, 1934, the Court of Claims has jurisdiction only of such claims as were presented within the limitation period defined in section 4 of the 1934 Act, which required that claims should be filed within 6 months of the date of approval of the 1934 Act, or, at the option of the claimant, within 6 months after the completion of the contract, unless the time was extended by the Comptroller General.

Same; notice of intention to file claim does not toll limitation statute.—Mere notice of intention to do what the 1934 Act required cannot toll the statute. *Werner* v. *United States*, 86 Fed. (2d) 113; *Waters, et al.*, v. *United States*, 12 Fed. Supp. 658, 660.

Reporter's Statement of the Case

Same; extension of time for filing claim; only Comptroller General authorized to give.—Where the 1934 Statute required that a claim to be filed thereunder should be verified and should itemize the additional cost claimed; and where the alleged claim filed in the instant case within the 6-month period was neither verified nor itemized; it is *held* that the statute has not been complied with and that a later claim, verified and itemized, which was filed about 2 years later, was not timely, since the Comptroller General, who was the only one authorized to grant an extension of time, had not done so. *Douglas Aircraft Co.* v. *United States*, 95 C. Cls. 745.

Same; unauthorized extension of time does not give rise to estoppel.—Where an agent of the Government, not authorized to do so, led the plaintiff to believe that plaintiff's letter stating the intention to file a claim for increased cost due to the National Industrial Recovery Administration Act was a sufficient compliance with the statute and that plaintiff might file a verified, itemized schedule after the expiration of the required 6 months; it is *held* that this did not give rise to an estoppel, since only the Comptroller General, under the statute, had the authority to extend the time for filing a claim.

Same; authority of Government agents must be noted; Government not bound by act of agents unauthorized to act.—Persons dealing with the Government must take notice of the extent of the authority which the Government has given its agents (*Hawkins* v. *United States*, 96 U. S. 689, 691), and that the Government is not bound by the declarations of its agents unless it appears that they were acting within the scope of their authority. *Lee* v. *Munroe*, et al., 7 Cranch 366; *Wilber National Bank* v. *United States*, 294 U. S. 120, 123, 124.

Same; Government agent cannot waive statute of limitations unless expressly authorized to do so.—No officer of the Government has authority to waive the statute of limitations, unless this authority is expressly given him. *Finn* v. *United States*, 123 U. S. 227, 233; *Munro* v. *United States*, 303 U. S. 36, 41.

Same; the court has no jurisdiction where claim is not timely filed and extension not granted by authorized agent.—Since, admittedly, in the instant case, the required claim was not filed within the statutory period, and this period was not extended by the only agent of the Government authorized to do so; it is *held* that the Court of Claims is without jurisdiction and that plaintiff's petition must be dismissed.

The Reporter's statement of the case:

Mr. Horace S. Whitman for plaintiff.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff brought this suit under the act of Congress approved June 25, 1938, 52 Stat. 1197, to recover increased labor and material costs alleged to have been incurred and paid in the performance of a subcontract in connection with construction of the United States Post Office Building at Columbus, Ohio, under a contract between the Treasury Department and Henry Ericsson Company, the prime contractor.

The increased labor and material costs which, plaintiff claims, resulted from the enactment of the National Industrial Recovery Act approved June 16, 1933 (48 Stat. 195), are $3,042.55 and $91.85, respectively.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen and resident of Columbus, Ohio. For over 16 years he has been a plastering contractor and was so engaged in 1933 and 1934.

2. February 28, 1933, the Henry Ericsson Company hereinafter sometimes referred to as "Ericsson," of Chicago, Illinois, entered into a contract with the United States, through the Treasury Department, for the construction of a post office and courthouse building at Columbus, Ohio. May 16, 1933, plaintiff entered into a subcontract with Ericsson to do all lathing, plastering, furring, etc., in accordance with certain paragraphs of the specifications and the provisions of the subcontract.

3. A minor part of the subcontract was performed from August 25, 1933, to March 20, 1934. The bulk of the work on the subcontract was done from April 1 to November 22, 1934. The contract of Ericsson for construction of the post office and courthouse building was completed June 8, 1935, when the building was accepted and final settlement was made.

4. Plaintiff signed the President's Reemployment Agreement about August 10, 1933. The Code of Fair Competition for the Construction Industry, which was in effect during nearly all the time that work was being done on the subcontract, was approved January 31, 1934.

LABOR

5. Ericsson, the prime contractor, had asked a number of persons, or firms, for subcontract bids for plastering work in connection with the post office building for which it was making a bid to the government. Pursuant thereto plaintiff, after investigations of labor costs for such work, prepared his bid to Ericsson & Company the latter part of January 1933 and submitted it early in February 1933 for the plastering work called for by the government specifications, in the post office and courthouse building and, in that bid, computed the labor costs for such Union and non-Union skilled and unskilled labor as was necessary for such work at the prevailing wage rates which were then being paid by other persons, firms, and corporations in Columbus, Ohio, and vicinity. The prevailing wage rates at which skilled, semi-skilled, and unskilled labor could be obtained had not changed at the time plaintiff's bid was accepted by Ericsson and at the time the subcontract was signed May 16, 1933.

At the time plaintiff prepared his bid, and for a considerable time prior thereto, there had been very little construction work going on in Columbus, Ohio, due to the economic depression, with the result that the hourly rate of wages prevailing and then being paid for skilled and unskilled labor was less than the existing minimum Union schedule of wages for skilled, semi-skilled, and unskilled labor. The Union schedule of wages was not then being paid or demanded. At the time plaintiff prepared and submitted his bid and at the time his contract with Ericsson was signed, and for a considerable period of time prior thereto, skilled, semi-skilled, and unskilled mechanics and laborers, whether members of a labor Union or not, were working for and were being paid an hourly rate of wage less than the Union schedule of wages, and this was with the knowledge and acquiesence of the labor Unions, the Columbus Building Trades Council, affiliated with the National Building Trades Department of the A. F. of L., the Ohio State Building Trades, and the Columbus Federation of Labor. Prior to preparing and submitting his bid, plaintiff considered the wages he had paid to carpenters, plasterers,

plasterers' helpers (hod carriers), and common laborers for the small amount of work which he had been able to obtain for a few years prior to that time; he also investigated and inquired among other contractors what rates of wages they had been and were paying for similar skilled and unskilled work; and he also inquired of a number of Union and non-Union plasterers and lathers, carpenters, etc., as to what wages they were receiving for such work. As a result of this investigation, plaintiff computed his bid, so far as the cost of labor was concerned, on an hourly rate of wage of 90 cents for journeymen plasterers and lathers; 60 cents an hour for apprentice plasterers; 65 cents an hour for carpenters; 75 cents an hour for lathers; 50 cents an hour for plasterers' helpers (hod carriers), and 40 cents an hour for common laborers, which hourly rates were the maximum rates prevailing and then being paid in Columbus and vicinity. Plaintiff found that in many instances hourly rates of wages considerably lower than the rates mentioned had been and were then being paid by different persons at different times. There was a great deal of unemployment in and around Columbus. Mechanics and laborers, in the classes mentioned, in the early part of 1933 and for a considerable time prior thereto worked for whatever they could get, whether they were members of a labor Union or not. Due to the depression the rate of wages prevailing in Columbus in 1932 and early in 1933 at which Union men could then be employed was from 10 to 15 cents an hour less than the Union scale of hourly wages which existed in early 1933 and for a considerable time prior thereto. The hourly rate of wages being paid to non-Union laborers at the time plaintiff made his bid and signed the contract with Ericsson, and for a considerable time prior thereto, ranged from 25 to 40 cents an hour; plaintiff computed his bid on the basis of 40 cents an hour for common laborers.

After enactment of the National Industrial Recovery Act in June 1933 and the signing of the President's Reemployment Agreement by plaintiff in August, the labor Unions through authorized representatives made demands on plaintiff and other contractors for increased wages as a result of and based upon the purposes of the National Industrial Re-

covery Act and the statements of the President in "Release No. 200" by the National Recovery Administration on August 6, 1933. In this Release the President made reference to increased costs to government contractors due to increasing wages and the shortening of hours and stated he would recommend that Congress give relief to government contractors in proper cases whose costs of performance of their contracts were so increased. These demands for increase in wages, over what had been and were then being paid, became a subject of collective bargaining between employers and employees which resulted in agreements, including an agreement by plaintiff, to increase wages over the prevailing rate of wages that existed prior to and at the time of signing of plaintiff's subcontract with Ericsson. Accordingly, wages were increased by plaintiff as follows: Plasterers from 90 cents to $1 an hour; carpenters from 65 to 80 cents an hour; plasterers' helpers (hod carriers) from 60 to 62½ cents an hour; and common laborers from 40 to 50 cents an hour. These increases in hourly wage rates were in effect during all the time plaintiff worked on the subcontract with Ericsson for construction of the United States Post Office Building, and were paid by plaintiff. As a result of these increased hourly wage rates, plaintiff incurred increased and additional labor costs in the amount of $3,042.55. These increases in wages were the result of the enactment of the National Industrial Recovery Act.

MATERIAL

6. In performance of his subcontract with Ericsson plaintiff incurred and paid an increased cost of $84.20 for certain material as a result of the enactment of the National Industrial Recovery Act, through compliance with certain provisions of the Builders Supply Industry Code to which plaintiff was subject.

FILING OF CLAIM

7. L. K. McDorman was plaintiff's authorized agent in Washington, D. C., in the matter of making his claim to the government for increased costs growing out of the subcontract. McDorman was also the agent of the general con-

tractor and of practically all other subcontractors on the job. Sometime after June 16, 1933, McDorman had a conference with the legal section of the U. S. Procurement Division of the Treasury Department and notified them that plaintiff intended to file a claim for increased costs. October 8, 1935, McDorman filed with the attorney of the legal section the following letter:

ASSISTANT DIRECTOR,
Public Works Branch, Procurement Division,
Treasury Department, Washington, D. C.

DEAR SIR: Please be advised that it is our intention to file a claim for increased cost due to N. R. A., for our subcontract with the Henry Ericsson Company, for construction of the U. S. Post Office, Columbus, Ohio.

Very truly yours,

RAY RIETHMILLER & CO.,
By L. K. MCDORMAN,
613 15th Street NW., Washington, D. C.

The purpose of plaintiff in filing this letter with the Procurement Division was to go on record as making a claim under the Act of June 16, 1934 (48 Stat. 974), with the understanding that detailed information would be filed by him later, and the Procurement Division so understood.

Shortly after filing the letter the attorney in the legal section advised McDorman that it would be better to file a statement setting out some amount, even if only an approximate amount, and that without some amount the aforesaid letter was not sufficient to constitute a proper claim under the Act of June 16, 1934. Thereupon McDorman, on October 23, 1935, on behalf of the plaintiff, filed with the legal section a letter addressed to the Director of the Procurement Division as follows:

> Please be advised that it is our intention shortly to submit a claim for increased cost due to the N. R. A., in approximate amount of $4,000.00, in connection with our subcontract for plastering, incidental to construction of U. S. Post office, Columbus, Ohio.

This letter was received and filed without objection being made to it then or later as a good claim to be later perfected by itemized schedules.

8. September 4, 1937, the Chief Counsel, Procurement Division, Treasury Department, wrote plaintiff a letter as follows:

> Reference is made to your letters of October 8 and 23, 1935, to the effect that you intended to file a claim pursuant to the provisions of the Act of June 16, 1934, 48 Stat. 974.
>
> Promptly after receipt of your letters you were furnished forms upon which your claim might be presented.
>
> In view of the fact that no further word has been heard from you and the claim in question has not been filed, it is assumed that you have abandoned the claim and the files of this Department will be closed.

September 13, 1937, plaintiff answered this letter as follows:

> My delay in answering your letter of Sept. 4, 1937, has been caused by my absence from the city.
>
> In regard to the above mentioned claim, all necessary papers and forms have been properly filled out and are in the hands of L. K. McDorman, Room 510 Metropolitan Bank Bldg., your city. It was my understanding that he had already filed this claim; if not, please advise, as it is my intention to do so.

9. October 15, 1937, McDorman wrote a letter to the Procurement Division in which he made reference to the letters set out in the preceding finding, and enclosed with the letter an itemized verified claim.

10. November 4, 1937, the Chief Counsel, Procurement Division, Treasury Department, wrote McDorman as follows:

> The receipt is acknowledged of your letter of October 15, 1937, transmitting the documents therein listed, regarding the claim of Ray Riethmiller for relief under the Act of June 16, 1934, 48 Stat. 974.
>
> Consideration will be given your letter and its enclosures in connection with the claim.

The evidence does not show what consideration was given to this claim after November 4, 1937, by officials of the Procurement Division of the Treasury Department or by the Comptroller General's office to the date of enactment of the Act of June 25, 1938, conferring jurisdiction upon this court to hear and determine claims of government contractors for increased costs resulting from the enactment of the National Industrial Recovery Act.

11. The Comptroller General did not extend the time for the filing of this claim.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues under the Act of June 25, 1938,[1] to recover increased labor and material costs due to the passage of the National Industrial Recovery Act. The defendant's main defense is that the claim was not filed within the time required by this Act.

Section 1 of the Act of June 25, 1938, provides:

> That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of contractors, including completing sureties and all subcontractors * * * whose contracts were entered into on or before August 10, 1933, for increased costs incurred as a result of the enactment of the National Industrial Recovery Act: *Provided*, That * * * this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C., secs. 28–33).

Sections 1 and 4 of the Act of June 16, 1934, 48 Stat. 974, 975, provide:

> SECTION 1 * * * Any contractor, subcontractor, or completing surety desiring an adjustment and settlement with respect to any such contract under this Act for increased costs incurred after August 10, 1933 * * * shall file with the department or administrative establishment concerned a verified claim itemizing such additional costs * * *.
>
> SECTION 4. No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this Act, or, at the option of the claimant, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant.

Under these Acts we have jurisdiction only of such claims as were "presented within the limitation period defined in

[1] 52 Stat. 1197.

section 4 of the Act of June 16, 1934" (48 Stat. 974, 975). That section required the filing of the claim within six months, unless the time was extended by the Comptroller General. The character of the claim to be filed was defined in section 1. It was "a verified claim itemizing such additional costs."

The only semblance of a claim filed by plaintiff within the six months was a letter reading, "* * * it is our intention shortly to submit a claim for increased cost due to the N. R. A., in approximate amount of $4,000."

This was merely notice of intention to do what the Act required; it did not constitute the filing of the claim. Mere notice of intention to do what the Act required cannot toll the statute. *Werner* v. *United States*, 86 F. (2d) 113; *Waters, et al* v. *United States*, 12 F. Supp. 658, 660.

But aside from this, the statute required that the claim to be filed should be verified and should itemize the additional cost claimed. The alleged claim which was filed within the six-month period was neither itemized nor verified. An itemized verified claim was filed about two years later, but the Comptroller General had not extended the time for filing it, and he was the only one authorized to do so. The 1934 Act forbade consideration of any claim which was not presented within six months or within such further time as the Comptroller General might allow. *Douglas Aircraft Co.* v. *United States*, 95 C. Cls. 745.

It is suggested that the defendant is estopped to plead the statute because the General Counsel of the Procurement Division led plaintiff to believe that the letter filed on October 23, 1935, was a sufficient compliance with the statute and that he might file his verified itemized schedules after the expiration of six months. This does not give rise to an estoppel because the defendant had not authorized this one of its agents to make any such statement, but, on the contrary, had said that only the Comptroller General had this power. This was said in the very Acts which create the right upon which plaintiff sues. Plaintiff knew, or should have known, that only the Comptroller General had the right to extend the time for filing the claim and, therefore, had no right to rely upon the statement of the General Counsel of the Procurement Division. Long ago it was held that persons dealing with the

Government must take notice of the extent of the authority it has given its agents, *Hawkins* v. *United States*, 96 U. S. 689, 691, and that it is not bound by the declarations of its agents unless it appears that they were acting within the scope of their authority. *Lee* v. *Munroe*, *et al.*, 7 Cranch 366; *Wilber National Bank* v. *United States*, 294 U. S. 120, 123–124. It was also held many years ago that no officer of the Government has authority to waive the statute of limitations, unless this authority is expressly given him. *Finn* v. *United States*, 123 U. S. 227, 233. This was reiterated within the last decade. *Munro* v. *United States*, 303 U. S. 36, 41.

In the case last cited a veteran wished to sue to recover on a War Risk Insurance policy. The Assistant United States Attorney had told him that it was necessary only to serve the summons within the statutory period and that the complaint could be filed later. Relying thereon, summons was served within time, but the complaint was not. The Supreme Court held that the District Attorney had no power to waive the statute of limitations, and dismissed the suit.

Since, admittedly, the required claim was not filed within the statutory period, and this period was not extended by the only one authorized to do so, we are of opinion that we are without jurisdiction, and that plaintiff's petition must be dismissed. It is so ordered.

WHALEY, *Chief Justice*, and BOOTH, *Chief Justice* (retired), recalled, concur.

LITTLETON, *Judge*, dissenting:

The defendant interposes two defenses to plaintiff's claim. The first goes to the entire claim made and is that plaintiff is not entitled to maintain this suit to recover increased costs that may have been incurred as a result of the enactment of the National Industrial Recovery Act for the alleged reason that plaintiff did not file a claim, as required by the act of June 25, 1938, within six months after completion on June 8, 1935, of the prime contract between the United States and Henry Ericsson & Company, and for the further reason that no extension of time was granted.

The second defense is that if it should be held that under the circumstances the claim as filed was sufficient to give the court jurisdiction, no recovery can be had for the claimed increased labor costs for the reason that the evidence is not sufficient to show the amount of such increased cost, or that, if plaintiff did have an increased cost over the amount included in his bid for labor for the work to be performed under his contract, such increased cost was not the result of the enactment of the National Industrial Recovery Act.

Under the second defense defendant admits that if plaintiff is entitled to maintain the suit he is entitled to recover the amount of $84.20, increased material costs shown to have resulted from enactment of the National Industrial Recovery Act.

Under the facts and circumstances established by the record I am of opinion that the claim for increased labor and material costs filed October 23, 1935, and later perfected, which claim was received and held under consideration by the proper and authorized officials of defendant without objection from the time it was presented until the trial of this case, was sufficient under the circumstances to entitle plaintiff to maintain this suit and to give this court jurisdiction under section 1 of the act of June 25, 1938. It appears from the evidence, about which there is no controversy, that plaintiff's representative and agent in Washington, L. K. McDorman, had several conferences prior and subsequent to October 8, 1935, with the authorized officials of the Procurement Division of the Treasury Department, which was the administrative establishment with which a claim under the act of June 16, 1934, was required to be filed. On October 8, plaintiff, through his agent, wrote a letter addressed to the Assistant Director, Public Works Branch, Procurement Division, in which it was stated: "Please be advised that it is our intention to file a claim for increased cost due to N. R. A., for our subcontract with the Henry Ericsson Company, for construction of the U. S. Post Office, Columbus, Ohio." The plaintiff's purpose in filing this letter and the letter of October 25, with the Procurement Division after having conferred with the legal section of that division was to place himself on record as making a claim under the act of June 16, 1934,

with the understanding by both parties that he would be privileged later to present detailed information itemizing the claim. The Procurement Division so understood and consented to this procedure, and no objection was ever made by the Procurement Division or anyone else to this procedure. It would seem that the chief counsel of the Procurement Division would not have concurred in that procedure unless it was in accordance with the policy of the Comptroller General. Both he and the Comptroller had to pass upon the claim. Shortly after the above-quoted letter of October 8, 1935, was filed with the Procurement Division, plaintiff's representative was orally advised by the legal section of the Procurement Division that it would be better in making claim, to file a statement with the Procurement Division setting out some amount, even if only an approximate amount, and that without the claiming of some amount the letter of October 8, 1935, would not be sufficient to constitute a claim under the act of June 16, 1934. In other words, plaintiff was told that if he filed a claim for a definite amount he could complete the claim with itemized schedules later. Thereupon plaintiff filed with the Procurement Division on October 23, 1935, another letter stating: "Please be advised that it is our intention shortly to submit a claim for increased cost due to N. R. A., in approximate amount of $4,000.00, in connection with our subcontract for plastering, incidental to construction of U. S. Post Office, Columbus, Ohio." This letter was received and filed, and no objection was made to its sufficiency as a claim subject to later itemization, as previously discussed by the legal section of the Procurement Division and plaintiff's agent. Upon receipt of the last-mentioned letter of October 23, 1935, the Procurement Division furnished plaintiff with forms, which plaintiff had requested, for preparation and presentation of the various detailed items and information making up the claim. On September 4, 1937, the itemized schedules of the claim on the forms supplied had not been completed and presented, and, on that date, the chief counsel of the Procurement Division wrote plaintiff a letter, as set forth in finding 8, in which he stated to plaintiff, after referring to plaintiff's letters of October 8 and 23 and the furnishing of forms, that "In view

of the fact that no further word has been heard from you and the claim in question has not been filed, it is assumed that you have abandoned the claim and the files of this Department will be closed."

The prime contract with the government was completed June 8, 1935, and the six-months' period mentioned in section 4 of the act of June 16, 1934, for presentation of a claim expired December 8, 1935, or one year, eight months, and twenty-six days before the above-mentioned letter of the chief counsel of the Procurement Division was written to plaintiff on September 4, 1937. It is obvious therefore that the Procurement Division, Treasury Department, in which the statute required the claim to be filed, considered that plaintiff's letter of October 23, 1935, setting forth the claim in the approximate amount of $4,000, was sufficient to satisfy the requirements of the act of June 16, 1934, subject to completion by the later filing of the itemized schedules of the claim.

Upon receipt of the above-mentioned letter of September 4, 1937, from the chief counsel of the Procurement Division, plaintiff replied that all necessary papers and forms had been properly filled out by him and were in the hands of his agent in Washington and stated that it was his understanding that he had already filed the claim. Thereafter, on October 15, 1937, itemized schedules of the claim for increased costs were transmitted to the Procurement Division with a letter making reference to the previous letters between the parties, with the statement— "Please advise at an early date what further records will be necessary in support of this claim, as this office in Washington is acting as agent to the Claimant." Upon receipt of these itemized schedules of the claim, the chief counsel of the Procurement Division wrote plaintiff on November 4, 1937, acknowledging receipt of the letter of October 15 and the documents therein listed regarding the claim for relief under the act of June 16, 1934, and stating that "Consideration will be given your letter and its enclosures in connection with the claim." The claim was thereafter held under consideration by the proper and the authorized officials of defendant without any further word to plaintiff concerning its timeliness or its sufficiency. No

final action appears to have been taken on the claim by the Comptroller General up to the time of passage of the act of June 25, 1938, conferring upon this court jurisdiction to hear and determine such claims.

In these circumstances, I think this suit should not be dismissed for lack of jurisdiction on the ground that plaintiff did not present a claim within the time allowed by section 4 of the act of June 16, 1934. Section 1 of that act provided that any contractor or subcontractor desiring an adjustment and settlement with respect to any such contract for increased costs incurred after August 10, 1933, "shall file with the department or administrative establishment concerned, a verified claim itemizing such additional cost." This section did not fix the time within which the claim was to be filed. Section 4 of the act did specify the time within which a claim might be presented and declared that "No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this act, or, at the option of the claimant, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant." Under this provision of the statute it seems clear that a late presentation or filing of a claim, or the timely filing of a claim and late filing of itemized schedules of the claim, was not fatal if such a claim was received and considered without objection. The statute expressly conferred discretion with respect thereto upon the Comptroller General. The broad claim filed on October 23, 1935, on time, and the completed itemized schedules filed on October 15, 1937, remained under consideration without any objection for more than 7 months after the letter of the chief counsel of the Procurement Division of November 4, 1937, was written to plaintiff stating that consideration would be given to the enclosures in connection with the claim, and before the act of June 25, 1938, was enacted. The claim to which the chief counsel had reference was plaintiff's letter of October 23, 1935, setting forth his claim in the approximate amount of $4,000, which letter was filed well within the six-months' period allowed by section 4 for presenting a claim.

Counsel for defendant argues however that the letter of

October 23, 1935, was not a claim within the meaning of section 4 of the 1934 act; that no verified, itemized claim as required by section 1 of that act was presented within six months after completion of the prime contract, and that the Comptroller General never extended the time for presenting the verified items of the claim. It was not necessary under the act for the Comptroller General to issue an order extending the time for filing, or for the completion of a claim, and the facts established by the evidence as to the circumstances and conditions under which the claim was made, perfected, and held under consideration are sufficient to justify the conclusion that the claim, as made, was sufficient to give this court jurisdiction to hear and determine the claim under the provisions of section 1 of the act of June 25, 1938. In any event I think the defendant is not, in the circumstances, in a favorable position to take advantage of the way in which the Procurement Division dealt with plaintiff, to his injury, especially in view of the remedial character of the acts of June 16, 1934, and June 25, 1938, as expressed in the long Congressional history of the act of June 25, 1938, as to the purposes of that act and the intention of the former act of 1934.

Plaintiff supposed as a result of what had happened, as recited in the findings, that his claim was in and would receive consideration as the General Counsel of the Procurement Division told him it would, and as, under the circumstances, it doubtless would if the act of June 25, 1938, had not been enacted before the claim was finally considered and acted upon by the Procurement Division and the Comptroller. If the General Counsel of the Procurement Division, with whom under the 1934 act plaintiff was authorized and required to deal in the preliminary stages of making and presenting his claim, had, in October 1935, advised plaintiff that a complete itemized verified claim must be on file before the end of a six-months' period, instead of advising that a claim for a definite amount filed within the six-months' period would be sufficient and could be completed and perfected later, and if the General Counsel had, when he wrote the letter of inquiry of September 4, 1937, or the letter of November 4, 1937, after the itemized schedules, of the claim

timely made, had been sent in, advised plaintiff that the claim was late instead of advising that consideration would be given to the itemized schedules in connection with the claim which had theretofore been made, plaintiff would have had an opportunity and the right under the 1934 act to resort to the Comptroller General for additional time. In view of the circumstances which resulted in the delay in submitting the itemized schedules, I have no doubt that plaintiff would have been successful in obtaining a favorable decision by the Comptroller General on the matter of filing or completion of the claim. Plaintiff lost this opportunity when the act of June 25, 1938, was enacted for, by that act, the Comptroller General no longer had jurisdiction of such claims or any question which might theretofore have been presented to him in connection therewith. Section 3 of the act of 1938 seems to have contemplated such a situation. In these circumstances and in view of the broad language of the 1938 Act (section 3) that in the consideration and adjudication of claims made the basis of suits here, the judgments or decrees of this court "shall be allowed on a fair and equitable basis, and notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res adjudicata, laches, or any provisions of Public Act Number 369, as enacted on June 15, 1934," I think the purpose of the 1938 act is carried out by our taking jurisdiction.

In addition to what has been said above as to the sufficiency, under the circumstances, of the letter of October 23, 1935, and the schedules subsequently submitted, as a claim under the act of June 16, 1934, I am of opinion that we have jurisdiction under a fair and reasonable interpretation of all the provisions of the act of June 25, 1938, in the light of its intended liberal purposes to afford contractors an opportunity to have their claims considered and adjudicated in this court, even if it should be necessary to say that the broad claim filed October 23, 1935, which was intended to be later perfected by the necessary itemized schedules, was technically not the complete claim which sections 1 and 4 of the act of June 16, 1934, contemplated should be filed within six months after passage of that act or after the completion of the contract, or at a later date in the discretion of the Comptroller

General for good cause. Compare *McCloskey & Co.*, 98 C. Cls. 90, and *Kawneer Co., et al.*, 100 C. Cls. 523. I think that in cases such as this the 1938 act contemplated that we might pass upon the matter of good cause for late filing where the Comptroller had not done so, or had not had an opportunity to do so. The recorded legislative history and the reports of the Congressional Committees on both the acts of June 16, 1934, and June 25, 1938, show that it was the Congressional intent and purpose that these acts be liberally interpreted to accomplish the main purpose of having claims of Government contractors for increased costs due to compliance with the President's Reemployment Agreement and/or to the enactment of the National Industrial Recovery Act determined on a fair and equitable basis without regard to technicalities. The act of June 25, 1938, giving this court jurisdiction to hear and determine claims of contractors who had presented claims under the act of June 16, 1934, was enacted because, as the Congressional history shows, the Comptroller General had interpreted and applied the provisions of the 1934 act too strictly. And the legislative history of the 1938 act shows, as was set forth in the written communications incorporated in various committee reports, that it was the intention of this act to put an end to the authority of the Comptroller General further to consider claims which had been presented under the 1934 act.

The defense interposed to our jurisdiction in this case is in effect that plaintiff *was guilty of laches* in failing to present, under the act of June 16, 1934, to the Procurement Division of the Treasury Department a complete itemized claim as described in section 1 of that act, and that since the Comptroller General did not reach the claim for consideration and decision before enactment of the act of June 25, 1938, and therefore did not exercise or have occasion to exercise the discretion conferred upon him by the 1934 act with reference to late presentation or as to the perfection and completion after expiration of six months of the broad claim presented in time, we are without authority under the *proviso* of section 1 of the 1938 act to do other than to reject the claim and dismiss the petition notwithstanding the good faith of the Government officers concerned and the plaintiff in connection

with the way in which the claim was first presented and later perfected, and notwithstanding the fact that the claim is meritorious in its legal and equitable aspects. I think section 3 of the 1938 act was inserted to guard against such a defense. It seems clear enough that in the enactment of the 1938 act Congress knew and had in mind when it inserted section 3 of the act of 1938 that in addition to claims upon which the Departments concerned and the Comptroller General had acted, there would doubtless be a number of claims which had been presented or filed by contractors under the 1934 act which the departments or administrative establishments concerned, or the Comptroller General, had not reached or taken up for the purpose of making findings of fact and decisions, and that it was for this reason that Congress inserted section 3 of the 1938 act directing that judgments of this court should be allowed upon a fair and equitable basis "notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res adjudicata, laches, or any provisions of Public Act Numbered 369, as enacted on June 16, 1934." The proviso in section 1 of the 1938 act that "this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934," should be interpreted and applied on the question of our jurisdiction of the claims made in this court in the light of the provisions of section 3 above quoted. All parts of a statute must be given proper effect. Enacting provisions or clauses of a statute may limit, modify, or clarify the language or intent of a *proviso* therein, and in such cases such enacting provisions and *provisos* should be given their proper weight when interpreting the statute for the purpose of arriving at its intention as gathered from all of its provisions. When so interpreted and applied I think we have jurisdiction to adjudicate the present claim.

It is a reasonable and fair interpretation of the *proviso* to section 1 of the 1938 act when considered in the light of section 3 of that act to say that in situations such as are disclosed by the peculiar facts in this case good cause existed for the failure of plaintiff strictly and literally to comply with the language of section one of the act of June 16,

1934, as to the filing of a complete itemized claim within six months, and that, in the circumstances, plaintiff was sufficiently diligent, was not guilty of laches, and that the claim here made is within our jurisdiction under a fair and equitable interpretation of the act of 1938, including the proviso of section 1, and in accordance with the real intent and purpose of the act as disclosed by its language and legislative history.

Plaintiff incurred increased labor costs in the amount of $3,042.55. (Finding 5.) Plaintiff made his bid and entered into a contract with Ericsson as a result of that bid upon the basis of the hourly wage rates for plasterers, plasterer helpers, carpenters, and common labor as set forth in the findings, which wage rates were less than the wage rates which it was necessary for plaintiff to pay such mechanics and laborers as a result of the enactment of the National Industrial Recovery Act, when he came to perform his contract. Plaintiff made his estimate in January 1933 of the labor costs and in preparing his bid for the subcontract plastering work, which he submitted to the prime contractor in February 1933, and upon the basis of which the contract with the prime contractor was subsequently entered into May 16, 1933, the wage rates at which he could then and subsequently, except for the enactment of the National Industrial Recovery Act and the issuance of the President's Reemployment Agreement thereunder, obtain Union mechanics and Union and non-Union labor were 90 cents an hour for plasterers, 50 cents an hour for plasterers' helpers (hod carriers), 65 cents an hour for carpenters, and 40 cents an hour for labor. These wages were later increased in August 1933 (finding 5). Defendant argues, however, that paragraph 5 of article 6 of plaintiff's subcontract required him to employ Union labor and, in the end, he paid only the Union scale of wages. That is not decisive of the question presented here. Representatives of the labor Union who testified in the case admitted that at the time plaintiff made his bid and entered into the contract, and thereafter until the National Industrial Recovery Act was enacted, skilled and semi-skilled Union labor could be and was being employed in Columbus, Ohio, and vicinity, at hourly wage rates which were less than the

existing Union schedule of hourly wages for such Union labor, which was due to the widespread unemployment and the small amount of building construction being carried on in that territory. As these Union representatives expressed it, the men worked for whatever they could get prior to the N. I. R. A.

Before making his bid, plaintiff made an investigation among other contractors and among experienced plasterers, carpenters, and laborers, and based his bid as to labor costs upon the highest hourly wage rate within the range of wage rates which he found were being paid for such labor and for which he found, from inquiry among the men, they were willing to work.

Plaintiff signed the President's Reemployment Agreement shortly after August 10, 1933. The Code of Fair Competition for the construction industry which was in effect during practically all the time that work was being done under plaintiff's subcontract was approved January 31, 1934. A minor part of plaintiff's subcontract work was performed from August 25, 1933, to March 20, 1934, but the main portion of the work was performed from April 1 to November 22, 1934. In August 1933, about the time plaintiff signed the Reemployment Agreement, authorized representatives of the labor Unions in Columbus made demands upon plaintiff, as well as others, for payment of higher hourly wages than were then being paid, based on the purposes of the National Industrial Recovery Act and the statements of the President in Release #200 by the National Recovery Administration. These demands on behalf of labor became the subject of conferences between representatives of the employers and employees, including plaintiff, which resulted in agreements to increase wages over the then and previously existing wage rates, and at which it was admitted labor could be obtained at the time plaintiff made his bid and signed the subcontract with Ericsson. It was necessary for plaintiff to make the increase in wages which he paid, and the evidence shows and we have found as a fact that such increase in wages in the total amount of $3,042.55 was caused by and was the result of the enactment of the National Industrial Recovery Act. Plaintiff should therefore be given judgment for this amount.

As a result of the enactment of the National Industrial Recovery Act and by reason of compliance by plaintiff with the provisions of the Builders' Supply Industry Code with reference to prices for certain materials, plaintiff's cost of performance of his contract was also increased in the amount of $84.20 for certain material acquired and used by plaintiff in performance of his contract. The defendant admits that this item of increased material cost was the result of the enactment of the National Industrial Recovery Act.

I would enter judgment in favor of plaintiff for $3,126.75.

MADDEN, *Judge*, concurs in the foregoing opinion.

VIRGINIA ENGINEERING CO., INC., v. THE UNITED STATES

[No. 44603. Decided May 1, 1944]

On the Proofs

Government contract; erroneous statement on contract drawing.—Where, in connection with a contract for the construction of a Government building by the plaintiff, the statement on a contract drawing, submitted to bidders, as to the level of the ground water at the site of the proposed building, turned out to be erroneous; it is not shown by the evidence that there was any substantial seasonal variation in the water level; and it is shown that the statement on the drawing was wrong as of the time the excavation was made and as of the dates given on the drawing itself.

Same; warning to bidders to make their own investigations does not require bidders to presume falsity of information on contract drawing.—Where, in the standard Government instructions to bidders, which had been sent to the plaintiff, it is stated that "bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other local contingencies"; this language does not require bidders to presume the possible falsity of information, such as that given on the water level drawing in the contract in suit, for the purpose of inducing bids carefully adjusted to the stated conditions. See *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, 10.

Same; differences between contract drawings and specifications.—Where in a Government construction contract it was provided in the specifications that "in case of difference between drawings

and specifications, the specifications shall govern"; it is *held* that in the instant case no such difference is found between the drawing and the specifications as to require the drawing to be discarded from the contract.

Same; mutual mistake, reformation of contract.—Where, in connection with the Government construction contract, the Government apparently negligently misstated a material fact and thereby misled the plaintiff, to its damage; and where the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid; the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract, and the court should therefore, in effect, reform the contract by putting them in the position they would have occupied but for the mistake.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the briefs.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Virginia, with its principal place of business in Newport News, Virginia.

2. April 3, 1937, plaintiff, as a result of competitive bidding, entered into a written contract with the defendant, represented by L. H. Tripp, Veterans' Administration, as contracting officer, by the terms of which it agreed to construct a building designated as Hospital Building No. 110, at the Veterans' Administration Facility, Kecoughtan, Virginia, for a consideration of $694,100, all work to be performed in strict accordance with the specifications, schedules, and drawings, all of which were made a part of the contract by reference.

Copies of the contract and the specifications for the work are in evidence as plaintiff's Exhibits 1 and 2 and are made a part hereof by reference.

3. Prior to the time plaintiff submitted its bid the defendant furnished prospective bidders, including the plaintiff, with drawings and specifications of the proposed building, which subsequently became a part of the contract. At-

tached to the specifications were standard instructions to bidders, which in Article 1 provided in part—

> Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

Under "Earthwork," article 2, section i, page 1c–1, the specifications provided in part—

> Excavations shall be kept free from water during placing of concrete and pumping shall be done by the contractor when necessary to accomplish this result.

The corner of the proposed building nearest to the water of Hampton Roads was approximately 250 feet from the seawall, while the central portion of the building was approximately between 300 and 350 feet from the seawall. St. John's Creek was east, Hampton Creek west, and Jones Creek northwest of the building. All of these streams were tidal.

4. The plans for the proposed building called for a basement and subbasement under the central portion. The finished floor level of the basement was +15 and the finished floor level of the subbasement, which had an area of approximately 48 feet x 82 feet, was +5. The building was to be supported on composite piles and the specifications called for concrete pile caps to be placed on the tops of the piles. The thickness of the floor slab and pile caps was such as to require excavation for the subbasement to a depth of −2.0, except in one corner where it was necessary to excavate to a maximum of −2.75.

The drawing showing the details of the subbasement and the elevations (drawing 110–26) contains the legend

> No hydrostatic pressure shall be permitted to develop under subbasement slab until the concrete frame of the building has been completed.

This drawing, defendant's exhibit 4, is made a part of this finding by reference.

5. Composite piles have a wooden bottom section which has a wooden projection or tenon at its upper end. The upper section of the pile is a steel casing filled with con-

crete. Where such composite piles are used the wooden portion always terminates below the water level line, since any part of the pile not submerged in water would deteriorate.

Under "Composite Piling", article 3, section (e), page 2CA–1, the specifications provided with regard to the piles that—

> The top of the tenon on the wood section in place shall not be above Elevation −3.25, referred to mean low water at the site, when the pile has been driven to the required bearing.

6. Included in the drawings submitted to the prospective bidders was a drawing (number 110–25) entitled "Test Pit Data." This drawing showed the soil characteristics at ten test pits or borings at the building site. The soil characteristics are shown from elevations +10 to −50, and in connection with this portion of the drawing a line is shown below the datum elevation 0.0 which line bears the legend

> Approx. water line at El. −3 to −5 for all Pits. Taken Dec. 1936 & Jan. 1937.

This drawing, plaintiff's exhibit 3, is made a part of this finding by reference.

7. Drawing No. 5, which was issued to prospective bidders, carried the following explanation with respect to the datum line:

> Elevations are based on U. S. Eng'rs Local mean low water datum. Subtract 1.360′ to refer to C. & G. S. mean sea level datum.

Mean low water is the average between the low low tide and the high low tide. It is at a lower elevation than an average between the mean high tides and mean low tides.

8. Plaintiff's home office is located approximately nine miles from the site of the proposed building, and its vice president, Robert C. Biener, who prepared its bid, visited the site of the work prior to submitting plaintiff's bid. He investigated the general conditions at the site, but did not attempt to ascertain the actual elevation of the water line. In preparing plaintiff's bid he used quantity estimates made from the specifications and drawings.

Plaintiff in estimating its bid made no provision for what is known as "wet excavation" but included an amount of $150 to $200 intended to cover the cost of removing rain and surface water by means of a sump and pump system.

9. April 19, 1937, plaintiff received notice to proceed with the contract and began work the latter part of May, the first work being excavation for the wings, basement, and subbasement. May 28, 1937, water was encountered in the subbasement area at approximately elevation +4.5. May 29, 1937, this fact was reported orally to Thomas G. Dodd, defendant's construction engineer in charge, and after some discussion about the matter plaintiff made an attempt to remove the water by constructing two sump pits equipped with pumps. This arrangement was tried for three or four days but failed to remove the water from the excavation.

10. Plaintiff's vice president Biener then told the Government construction engineer that in his opinion the only thing that would relieve the water situation would be a wellpoint system. Plaintiff on its own initiative immediately ordered what is known as a Moretrench wellpoint system, on a rental basis, from the Moretrench Corporation of Rockaway, New Jersey, and began installation of it on June 4, 1937.

A wellpoint system consists of a series of pointed and perforated pipes which are driven into the ground and connected to a header pipe or a series of headers which are in turn connected to a suction pump, driven in the present instance by a gasoline engine. It is a commonly used method of dewatering areas to be excavated.

11. June 4, 1937, plaintiff wrote as follows to the defendant's superintendent of construction:

> We wish to call your attention at this time to the fact that in excavating for subbasement of the above building, we encountered ground water at elevation approximately plus 4.5, whereas on the contract drawing No. 110–25, it is shown that ground water would be encountered at elevation minus 3 to minus 5, approximately.
>
> The great difference between the information given us on contract drawings and the conditions actually encountered necessitated considerable expenditure on our part not included in our estimate, for wellpoint system, pumping, additional cost for removing earth, etc.

At a later date we will file with you an itemized estimate for this additional cost, for which we will expect payment in addition to our contract.

12. June 15, 1937, defendant replied to plaintiff's letter of June 4, as follows:

Receipt is acknowledged of your letter of June 4th, 1937, relative to water condition encountered by you in subbasement section of building 110 at this facility under the above noted contract.

It is noted in your letter that it is your intention to file a claim with this office to cover additional expenditure for pumping water in the subbasement due to the fact that you encountered surface water at elevation plus 4.5, whereas contract drawing No. 110–25 shows that ground water would be encountered at elevation minus 2.5 to minus 3.5, approximately. Contract drawing No. 110–25 relative to test pit data indicated the approximate water at elevation 3 to minus 5 for all pits "Taken December 1936 and January 1937."

Inasmuch as the water condition noted on contract drawing is for a specific period and antedated the condition found on the job by several months, it is the opinion of this office that you are not justified in filing a claim for extra, as ground water is subject to seasonal variations and the water level could have been determined by you without difficulty prior to opening date of the proposal under which your contract was awarded.

Your attention is also called to Article (i), Page 1–c–1, of the specifications which provides, among other requirements, that excavation shall be kept free from water during placing of concrete and pumping shall be done by you when necessary to accomplish this result.

In view of the foregoing, unless additional information is furnished this office, it is not felt that you have sufficient foundation for filing a claim. However, you are at liberty to file your claim for the extra, setting forth such information and data to substantiate same, at which time it will be given due consideration.

13. Plaintiff completed the installation of the wellpoint system and began its operation on June 6 or 7, 1937. This system was operated continuously 24 hours per day until September 10, 1937, when it was removed, with the exception of four 8-hour shifts at the beginning and end of the period, during which it was shut down, and except for short periods of time required to repair minor breakdowns such

as broken pipe. The wellpoint system as installed operated successfully.

14. September 17, 1937, and after the rental period and cost of operating the wellpoint system had been established, plaintiff wrote to the construction service, Veterans' Administration, requesting a change order, the request being as follows:

> Under date of June 4th we advised that we would file with you an itemized estimate of additional cost for wellpoint system, pumping and excavation, not included in our proposal under which the subject contract was awarded.
>
> Proposals for subject contract were opened in March 1937. Contract was awarded April 3, 1937. Excavation for Subbasement was started in May 1937, and at that time water was encountered at elevation plus 4.5. At this writing the water line remains at plus 4.5 and has been approximately the same, with no more than 6 inches variation, since May.
>
> The information on contract documents, upon which our proposal was based, is misleading by an erroneous note on drawing number 110–25, which is a drawing showing location Plan and Test Pit Data. This note reads "Approx. Water Line at El. minus 3 to minus 5 for all Pits—Taken Dec. 1936 and Jan. 1937."
>
> In view of the note on this drawing it was not necessary for us to determine for ourselves the correctness of the statement that the water line was at El. minus 3 to minus 5. The reference to elevation of water line was a representation upon which we had a right to rely without investigation to prove its falsity.
>
> If the Veterans' Administration wished to leave the matter of determining the approximate water line to independent investigation prior to opening date of proposal under which our contract was awarded, it might easily have omitted any reference on the plan as to the approximate water line. The Test Pit Data and Note on drawing Number 110–25 assured us of the character of materials and approximate water line and the cost of excavation, pumping, etc., based on the representation of conditions as shown on that drawing was reflected in our proposal.
>
> Under actual conditions encountered, the water line was at elevation *plus* 4.5 or from 7 to 9 feet higher than represented according to contract plans. This naturally necessitated considerable additional expenditures

on our part, cost of which was not included in our proposal due to mistaken representations.

Had the water line been even approximately as represented, it would not have been necessary to install a wellpoint system and no sheathing would have been required because the Subbasement floor is at Elevation plus 5 and bottom of lowest pile cap is elevation minus 2.75.

In view of the above, we submit below itemized estimate of this additional cost.

Rental—Moretrench Outfit—Start—June 3rd—1st month	$378.00
$70.00 per week for 11 weeks includes shipping time	770.00
Freight on Moretrench Outfit two ways	225.60
Hauling Moretrench Outfit two ways	30.00
Install Moretrench Outfit (Labor)	214.70
Dismantle Moretrench Outfit (Labor)	132.86
Rental 4" Pump—15 weeks, @ $10.00	150.00
Rental 2" Pump—15 weeks, @ $10.00	150.00
Gasoline for Pumps & Outfit	586.00
Repairs to Pumps & Outfit	80.00
Operators for Pumps and Outfit—24 hours per day (labor)	1,952.34
Excavation for Sumps (labor)	55.31
Lumber for Sheathing Sumps	42.00
Labor for Sheathing Sumps	34.70
	4,801.51
Insurance on $2,389.91 labor 8%	191.19
	4,992.70
Overhead and Supervision	300.00
	5,292.70
10% profit	529.27
	$5,821.97

We, therefore, request Change Order in the amount of $5,821.97 as addition to our contract price and 30 days extension to contract time.

15. September 27, 1937, plaintiff's request for a change order in the amount of $5,821.97 was denied by defendant's superintendent of construction, who stated, in part, as follows:

* * * * *

You are advised that the subsurface conditions shown on contract drawing #110-25 relative to test pit data indicates the approximate water at elevation 3 to minus 5 for all pits "taken December 1936 and January 1937."

You are further advised that inasmuch as the water conditions noted on contract drawing was for a specific period, antedating the conditions found on the job for several months, it is felt that you are not justified in filing a claim for extra, as ground water is subject to seasonal variations and the water level could have been determined by you without difficulty.

Your attention is invited to Article (i), page 1C–1, of the specifications, which provided, among other requirements, that excavation shall be kept free from water during placing of concrete and pumping shall be done by the contractor, when necessary, to accomplish this result.

Unless you can show an abnormally high water condition at the site due to excessive rains or high tides, you are not entitled to any extra on account of pumping. In view of the close proximity of the building site to Hampton Roads, the actual conditions existing at the site should have been verified by you so that you could accomplish work according to contract requirements. In view of the foregoing the above-mentioned proposal is rejected.

16. The contract contained the following provisions:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided

in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

*   *   *   *   *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Article 12, page 1G-4 of the specifications reads as follows:

(a) The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose de-

cision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

(b) The opinion of the contracting officer as to the proper interpretation of the drawings and/or specifications shall be final, subject to written appeal by the contractor, within thirty (30) days, to the Administrator whose decision shall be final and conclusive upon the parties hereto.

17. On November 10, 1937, plaintiff's vice president, Mr. Biener, conferred with Colonel Tripp, the contracting officer, in connection with plaintiff's claim for the cost it had incurred in dewatering the excavation. Plaintiff requested Colonel Tripp to appoint a board to pass upon plaintiff's claim, which was done, and in January 1938, Mr. Biener appeared before the board.

Plaintiff at first submitted its original claim of $5,821.97, but at the suggestion of the board checked the items of cost with defendant's superintendent of construction, and, with the hope of obtaining a settlement, reduced its original claim to $4,104.68 by omitting all supervision and overhead costs and all claim for profit.

18. June 16, 1938, the defendant's contracting officer disallowed plaintiff's claim. In the letter of disallowance the contracting officer, after quoting Article 4 of the contract and Article 12, page 1G–4, of the specifications, which are set out in Finding 16, stated—

* * * * *

It appears that you encountered ground water on May 24, 1937, when excavation for basement had reached an approximate elevation +4.5 and that you had ordered a "more trench" wellpoint pumping system on May 26 and had it installed and started pumping water on or about June 3, 1937, and that on June 4, 1937, you advised this office in effect that due to the difference between the information on the drawing and the conditions actually encountered you would later file claim for an extra. It thus appears that you proceeded with the

procurement, installation, and the utilization of the wellpoint pumping system prior to calling the contracting officer's attention to this matter as required by the contract. It is considered therefore that the responsibility for the installation and utilization of this wellpoint system devolved upon you.

Furthermore, the conclusion cannot be reached that there were unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, and a prudent contractor would have included the work covered by your claim in his initial bid on the contract. The claim is therefore disallowed.

19. June 23, 1938, plaintiff again wrote to defendant's contracting officer requesting a reconsideration of the disallowance of its claim, and on June 30, 1938, the contracting officer wrote to plaintiff stating that—

* * * * *

Your above-mentioned letter does not furnish any information which heretofore has not received full consideration, and consequently my decision of June 16, 1938, is considered a proper one in view of the circumstances involved.

20. July 11, 1938, plaintiff appealed its claim to the Administrator of the Veterans' Administration as the head of the department, submitting with the appeal the complete file of correspondence.

November 12, 1938, the assistant administrator of the Veterans' Administration notified plaintiff as follows:

* * * * *

In accordance with the provisions of this contract the Administrator has carefully reviewed all the facts and circumstances attending this case and has disallowed your appeal.

21. Plaintiff in signing the final voucher for payment under the contract reserved the right to further prosecute its claim for the extra cost incurred in the installation of the wellpoint system.

22. The total rental charge for the Moretrench wellpoint system paid by plaintiff was $1,148.00; cost of repairs and

replacement parts, $10.22; freight paid for shipping wellpoint system to plaintiff from the Moretrench factory in New Jersey was $81.60, together with a car stoppage charge of $2.70. Return freight was $84, making a total railroad charge of $168.30. Cost of gasoline and oil used to operate the wellpoint system totalled $411.89. The cost of hauling the system to and from the railroad car to the job site was $30, the labor cost for installing it was $169.16, and the cost of dismantling, loading, and bracing it on the car for shipment was $154.

Three pump operators were employed, each operating on an 8-hour shift, and except at the beginning and end of the operation the system was operated continuously twenty-four hours a day. The three pump operators at times did some other work, such as greasing and oiling other machinery, cleanup work, and other odd jobs. Their primary work, however, was to attend to the wellpoint system and to be available in its vicinity to keep the system operating in case of stoppage or breakdown. No record was kept of the time they put in on other work, and the record does not contain any satisfactory data from which to make any allocation of their time which was devoted to other odd jobs, which were incidental to the primary purpose for which they were hired. A total labor cost of $1,723.50 was incurred for the pump operators. A further labor cost of $114.07 was incurred for extra labor used in making routine replacements and repairs to the system from time to time, these making a total labor cost of $1,837.57. Workmen's compensation insurance allocated to the system was $119.56 and the social security tax on labor was $62.84.

23. A tabulation of the above items follows:

Rental Moretrench wellpoint system	$1,148.00
Freight on Moretrench wellpoint system	168.30
Hauling Moretrench wellpoint system	30.00
Labor for installation	$169.16
Labor dismantling	154.00
Gasoline and oil	411.89
Labor for operating wellpoint system	1,837.57
Repairs and replacements	10.22
Workmen's compensation insurance	119.56
Social Security tax on labor	62.84
	$4,111.54

From the $4,111.54 there should be deducted $0.48 representing a tax on oil that should have been paid by plaintiff, and $175 which is the cost plaintiff used as an estimate in its bid for removal of rain water and surface water. This leaves $3,936.06 as plaintiff's unanticipated cost of removing the ground water from the subbasement excavation area.

24. A construction engineer in excavating within 250 to 300 feet of tidal water would reasonably expect to encounter ground water at an elevation above rather than below mean low water.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff's claim is based upon a misstatement by the Government, on a contract drawing, as to the level of the ground water at the site of a building which the plaintiff constructed for the Government. The drawing was one of the papers submitted to prospective bidders for the contract, to enable them to compute their bids intelligently without feeling obliged to assume the possibility of adverse conditions which did not in fact exist, and raise their bids accordingly. The statement on the drawing was that the level of the ground water had been found at elevation −3 to −5 in ten test pits dug by the Government's agents during December 1936 and January 1937. When the plaintiff, having obtained the contract, began to excavate in May, 1937, it found the water level at elevation +4.5, or from seven to nine feet higher than the test pit drawing stated. It cost the plaintiff $3,936.06 more to do the work than it would have cost if the water level had been as stated on the drawing, and this suit is for that amount.

The Government offers no explanation of the misstatement. When the plaintiff discovered the actual level of the ground water and said that it expected to be paid its extra costs of coping with it, the Government's reply was that the drawing disclosed the ground water level as of December, 1936, and January, 1937, and that the level varied with the seasons. The plaintiff's evidence shows that there was no substantial variation from the end of May to the middle

of September. The Government offered no evidence at all to the effect that the discrepancy could be accounted for by seasonal variation. In that condition of the evidence we have concluded that there was no substantial seasonal variation in the water level, and that the statement on the drawing was wrong both as of the time the excavation was made, and as of the dates given on the drawing itself.

The Government says that it is immune from liability because of the following language in the standard instructions to bidders, which had been sent to the plaintiff:

> Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

This language does not require bidders to presume the possible falsity of information such as that given on the water level drawing, for the purpose of inducing bids carefully adjusted to the stated conditions. See *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, 10.

The Government says that certain statements in the specifications were inconsistent with the statement on the drawings about the ground water level, and that the specifications provided:

> In case of difference between drawings and specifications, the specifications shall govern.

The inconsistent statements in the specifications relied on by the Government are (1) that excavations should be kept free of water during the placing of concrete, and (2) that the wooden portion of composite piles should be cut off at elevation −3.25. As to (1) it is urged that if the water level had been at −3 to −5, as the drawing stated, there would have been no point in the requirement that excavations should be kept free of water since there would have been no water at the level of any of the excavation. This contention is not sound, for regardless of the level of the ground water, heavy rains while excavations are open always cause an accumulation of water which should be pumped out before concrete is poured. As to (2) the language of the specifications was:

> The top of the tenon on the wood section in place shall not be above elevation −3.25, referred to mean low water at the site, when the pile has been driven to required bearing.

Piles driven to −3.25 would have been submerged, if the water level had been at −3. The drawing said it was at −3 to −5. Since the specifications said that the tops of the piles "shall not be above" −3.25, and since the custom of the trade required that they be submerged, the contractor could well have been expected to drive them the small distance beyond −3.25 which would have submerged them if the water level had been at −5, the lowest level stated on the drawing. We therefore find no such difference between the drawing and the specifications as to require the drawing to be discarded from the contract.

The Government points to the fact that a drawing showing the detail of the subbasement contained a prohibition against the development of hydrostatic pressure, and that there could have been no hydrostatic pressure if the statement on the other drawing about the water level had been true. It says this should have warned the plaintiff that the statement was not true. But the excavation for the subbasement was to go to −2, and in one corner to −2.75. This was so near to the −3 of the water level drawing that the prohibition against hydrostatic pressure was not, by any means, obviously unnecessary. Even if there was a discrepancy which due care would have discovered, the plaintiff is not disabled from recovering, for reasons stated hereinafter.

The Government relies on Article 12, page 1 G-4 of the specifications, which provides in part:

> In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision such discrepancy shall not be adjusted by the contractor, save only at his own risk and expense.

We think that this article has nothing to do with our problem. Fairly interpreted, it contemplates a situation where the contract papers in one place seem to direct that one thing be done, and in another place another. A choice has

to be made, and the contracting officer, not the contractor, is given the choice. This plaintiff faced no such problem. It encountered water some seven to nine feet higher than it anticipated, and it had to get rid of the water before it could build the building. There was no choice to be made. If the plaintiff had adopted an unduly expensive method of getting rid of the water, it could not recover the excess cost which its method entailed. The Government's construction engineer in charge was notified immediately when the problem arose, and a cheaper method of removing the water, by a sump pump, was, to his knowledge, tried without success. He had no further suggestion, and the plaintiff then installed the wellpoint system, which worked. The Government lost nothing by reason of the plaintiff's handling of the problem.

The most meritorious contention which the Government makes is that, as we have found, a construction engineer in excavating as near to tidal water as this site was known to be would have reasonably expected to encounter ground water at an elevation above rather than below mean low water. We have, then, a situation in which the Government, apparently negligently, since no explanation is offered, and there is no reason to suppose intentional misrepresentation, misstated a material fact and thereby misled the plaintiff, to its damage. But the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before it submitted its bid. If the Government's representation had been intentionally false, the plaintiff's negligence in relying on it would not, in the other circumstances here present have prejudiced the plaintiff's position. It not being intentionally false, but both parties being negligent, we think their position is that of persons who have made a mutual mistake as to a material fact relating to the contract. We should, therefore, in effect reform the contract by putting them as nearly as possible in the position they would have occupied but for the mistake.

As we have said, the plaintiff was misled by the misstatement. It included in its computation of its bid only

a small sum for dealing with surface water such as would have been likely if the statement on the drawing had been true. It is fairly inferable that its bid would have been increased by substantially the amount of its increased cost, plus overhead and profit, if it had not been misled. As to what the Government's position would then have been, it is impossible to determine. Whether there were other bids; if so, how they compared with the plaintiff's bid; whether other bidders were misled as the plaintiff was, we do not know. If these facts would have been material, which we do not determine, it was the Government's duty to bring them forward, since it committed the first fault which produced the difficulty. We must assume, then, that the Government received the benefit of the plaintiff's additional expenditure which, we have found, was worth what it cost. It is not inequitable, then, to require the Government to pay for what it got. We include nothing for overhead and profit. We have not discussed the possible applicability of Article 4 of the contract, relating to "changed conditions," as the Government has taken the position that there were no conditions encountered differing from those indicated in the contract papers, if those papers had been properly read. With that attitude, the Government would not, as it did not, make any adjustment under Article 4, and cannot fairly claim that the plaintiff's position is prejudiced because it did not succeed in obtaining relief under that article.

The plaintiff may recover $3,936.06.

It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting:

Plaintiff contends that it is entitled to recover the additional cost of $3,936.06 incurred by reason of encountering water at an elevation higher than that shown on the contract drawings upon the theory (1) that the defendant's drawing 110–25 made a positive representation of a material fact

upon which plaintiff was entitled to rely, and defendant is liable for damages arising out of, and as a result of its misrepresentation, or (2) changed conditions within the meaning of Article 4 of the contract were encountered during the progress of the work, and plaintiff is entitled to recover the increased costs so incurred as a result of such changed conditions, under the provisions of the said Article.

In its brief defendant answers these contentions by attempting to show that they are not sustained by the record, as the contracting officer and the head of the department held in their decisions on the same questions.

Article 15 of the contract, quoted in finding 16, provided for final decisions by the contracting officer and the head of the department of "all disputes concerning questions of fact arising under this contract." Paragraph 12 (b), page 1G–4, of the specifications, constituting a part of the contract, provided that "The opinion of the contracting officer as to the proper interpretation of the drawings and/or specifications shall be final, subject to written appeal by the contractor, within thirty (30) days, to the Administrator, whose decision shall be final and conclusive upon the parties hereto." Neither party mentions these provisions in their briefs, but I think we cannot escape consideration of their effect on plaintiff's right to recover the increased costs claimed. Plaintiff's agreement to be bound by the decisions of the officials named is a fact to be considered in connection with all other facts in the case, and if the disputes which plaintiff presented to the contracting officer and the head of the department were disputes concerning questions covered by these provisions, as I think they were, those decisions must be treated as final here. It is not alleged and there is not sufficient evidence to show that the decisions were arbitrary or so grossly erroneous as to imply bad faith. On the contrary the record shows that the decisions were made in good faith. This being so plaintiff may not recover even though those decisions may have been incorrect.

I would dismiss the petition.

JONES, *Judge*, took no part in the decision of this case.

JAMES GARFIELD NEEDLES FOR THE USE AND BENEFIT OF JAMES GARFIELD NEEDLES AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A MARYLAND CORPORATION v. THE UNITED STATES

[No. 44994. Decided May 1, 1944]

On the Proofs

Government contract; rental of equipment; decision of contracting officer grossly erroneous; finality of contracting officer's decisions under the contract.—The court having found that the actions of the contracting officer with reference to the use of certain equipment were, upon the facts and under the terms and conditions of the contract in suit, arbitrary and so grossly erroneous as to imply bad faith, (*Saalfield* v. *United States*, 246 U. S. 610; *Chicago and Northwestern Ry. Co.* v. *United States*, 104 U. S. 681; *Ripley* v. *United States*, 223 U. S. 695; *Bein* v. *United States*, 101 C. Cls. 144) the question left for decision was whether the decisions of the contracting officer were intended to be final under the contract or whether plaintiff was required to appeal the contracting officer's decisions to the head of the department or else lose his right to maintain suit for recovery of damages for breach of contract.

Same; decisions of contracting officer were not required to be appealed, and were not decisions on questions of fact in the instant case.—Where, under the provisions of the rental contract in suit, it was required that adverse decisions of the contracting officer on questions of fact should, except as otherwise provided therein, be appealed by the contractor to the head of the department, whose decisions were final; it is *held* first, that the contract did not require appeals as to the particular decisions made by the contracting officer, but made his decisions final, and, second, that on the evidence adduced in the instant case the decisions which the contracting officer made were not decisions of questions of fact within the meaning of Article 12 of the contract.

Same; jurisdiction of the Court of Claims; damages by reason of breach of the contract by the defendant.—The fact that a claimant may, in addition to alleging a breach of the written contract and praying for general relief, also claim on *quantum meruit* under an implied contract not shown to have been a contract implied in fact does not deprive the Court of Claims of jurisdiction to adjudicate the claim and render judgment for damages proven for breach of the written contract if the damages so proven are within the fair scope of the facts al-

Syllabus

leged in the petition. *United States* v. *Behan*, 110 U. S. 338, 347; *John Hays Hammond* v. *United States*, 95 C. Cls. 539, 442, 543; *Electric Boat Company* v. *United States*, 66 C. Cls. 333, 377; *Hampton, Executor, etc.* v. *United States*, 82 C. Cls. 162, 172, 173.

Same; immaterial in the instant case whether there was a contract implied in fact or that recovery may not be measured under the quantum meruit rule.—Where the contracting officer did not at any time promise, expressly or impliedly, to pay a greater sum than the contract price at the rental stated therein; there was no contract implied in fact, but in the instant case it is immaterial to plaintiff's right to recover that there was no contract implied in fact; and it is also immaterial that recovery may not, in the instant case, be properly measured under the rule of *quantum meruit.*

Same; abandonment of work because of interference by defendant not a recision of the contract.—Where the plaintiff ceased to perform further under the contract, by reason of interference on the part of the defendant; and where the defendant did not rescind the contract but expressly continued it in force and proceeded to complete it with plaintiff's force and equipment, and charged all costs of completion against the amount otherwise determined to be due to the plaintiff; plaintiff's abandonment of the work was not a recision of the contract, and plaintiff did not thereby lose his right to claim damages and to object to unauthorized charges. *Cf. Quin* v. *United States*, 99 U. S. 30.

Same; breach of contract by defendant established by the evidence; measure and amount of damages.—In the instant case, it is *held* that plaintiff has submitted proper and adequate proof that the contract was breached by defendant, and also, adequate proof from which the measure of damages and the amount of actual damages can be fairly determined by the court with reasonable accuracy.

Same; certainly of amount of damages not essential.—Absolute certainty as to the amount of damages is not essential.

Same; measure of damages for breach of contract.—In all actions for damages for breach of contract the fundamental principle is full compensation for the wrong done; the general rule is that the compensation shall be equal to the injury; the breach is the measure by which the compensation is to be measured, and all that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the breach. *Dow* v. *Humbert, et al.*, 91 U. S. 294; *Hetzel* v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26; *Eastman Kodak Company* v. *Southern Photo Material Co.*, 273 U. S. 359; *Story Parchment Co.* v. *Patterson Parchment Co., et al.*, 282 U. S. 555; *Baker* v. *Drake*, 53 N. Y. 211; cited. *Hoffer Oil Corporation* v. *Carpenter*, 34 Fed. (2d) 589, 592, quoted.

Same; breach of contract by interference.—When a breach of contract interferes with the proper performance of a contract in accordance with its terms, the injured party may recover damages to the extent at least of any loss which was the necessary consequence of such interference. *United States* v. *Smith*, 94 U. S. 214; *Parish* v. *United States*, 100 U. S. 500; *United States* v. *Barlow*, 184 U. S. 123.

Same; anticipated profits.—As a part of the damage sustained for breach of contract, anticipated profits prevented by such breach may also be recovered where properly proven. *Howard* v. *Stillwell and Bierce Manufacturing Company*, 139 U. S. 199; *United States* v. *Behan*, 110 U. S. 338; *Anvil Mining Co.* v. *United States*, 153 U. S. 540; *Suburban Contracting Co.* v. *United States*, 76 C. Cls. 533.

Same; compensation for damages by breach of contract.—Since compensation is a fundamental principle of damages for breach of contract, the party who fails to perform his contract or who interferes with or prevents the other party from performing the contract according to its terms, is justly bound to make good all damages that naturally accrue from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Miller, et al.*, v. *Robertson*, 266 U. S. 243, 257; *Illinois Central Railroad Co.* v. *Crail*, 281 U. S. 57, 63.

Same; measure of damages not limited to actual loss.—In view of the nature of the contract in suit and the nature of the several breaches of the contract by defendant, as well as the evidence of record, which shows with reasonable certainty the amount of various items of actual damage sustained by plaintiff and the amount still due under the contract, as it was actually performed; the measure of damages is not limited to the cost of labor, services and materials furnished by plaintiff to the date on which plaintiff ceased to perform the contract, less what plaintiff received from the defendant.

Same; amount of recovery.—In the instant case, it is *held* that the proof submitted by plaintiff was sufficient to establish, and the Court has found as facts, that plaintiff suffered actual damages in connection with the use of his equipment and employees, in the performance of the contract in suit, including the amount still due under the contract, of $47,852.85, which amount the plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Philip Silver for the plaintiff.

Mr. Philip Mechem, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The issues in this case relate to (1) the alleged breaches by defendant of the rental contract for the use and operation as set forth therein of the mucking machines, mine cars, and other facilities; (2) whether the facts set forth in the petition are sufficient to show and allege such a breach of contract as would, if proven, entitle plaintiff to a judgment for damages; (3) the finality of the actions and decisions of the contracting officer, and whether the actions and rulings complained of were taken and made in good faith or were so grossly erroneous as to imply bad faith; (4) the measure of damages, and whether plaintiff has sufficiently proven the amount of damages sustained.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On August 15, 1936, as hereinafter more fully set forth, defendant began construction of a tunneling project on the Island of Oahu, T. H., under a contract with Plaintiff Needles. This project, so far as concerns the contract in the present case, consisted of the rental by defendant from plaintiff of mucking machines, or tunnel shovels, mine cars, and associated equipment for the removal of blasted material from approximately 130 horizontal galleries or tunnels, varying in length from 52 to 156 feet, with an approximate cross section of 10 x 10 feet, and a tunnel 675 feet long. The last-mentioned tunnel had an inclination or grade of 7.4% and a cross section of 12 x 12 feet. The galleries had an inclination or grade of approximately 2%. The tunnel and galleries had a combined length of approximately 18,000 feet and a combined volume of excavation, as originally estimated by defendant's contracting officer and his authorized representative who wrote the specifications, of approximately 65,000 cubic yards. This estimate was 56,040 cubic yards less than the excavation necessary to provide the galleries and tunnel specified.

Neither the contracting officer, a Lieutenant Colonel in the Engineering Corps, U. S. Army, nor his assistant, a Captain in the Engineering Corps who prepared the specifications, had ever had any experience or first-hand knowledge in tunneling operations or in the operation of tunneling machines and associated equipment.

The material to be blasted by defendant and excavated by plaintiff for this project comprised a volcanic rock of about the same consistency of what is commonly known as soft sandstone. The material was ideal for handling by the equipment furnished by and rented from plaintiff. It was comparatively light in weight and for the most part in small particles when blasted. For these reasons the stress and strain on the tunnel shovels and their mechanism while excavating the material under usual and normal conditions, and as provided in the specifications, were light.

2. The method of excavation required by the contract and specifications to be employed, and which plaintiff proposed and agreed to employ, was the conventional procedure in tunneling operations, and which employs a recurring cycle of operations. This was as follows:

A drill jumbo furnished and operated by defendant was advanced to the working face of a tunnel on a track leading to the portal and into and on the floor of the tunnel. This trackage was furnished by plaintiff, as hereinafter more fully set forth. The drill jumbo was a flat car or platform reasonably light in weight adapted to run on rails and trammable by hand, having an upwardly projecting framework at the front, carrying a series of pneumatic drills properly spaced and located on the framework. Upon being advanced to the working face of the tunnel, the pneumatic drills were operated by a drill crew furnished by defendant, and a series of holes were drilled in the face for receiving charges of dynamite. Defendant furnished all blasting material and performed all blasting work.

Upon completion of drilling operations, the drill jumbo was removed and the forward portions of the track and any equipment near enough to be affected by the blasting were covered with protective timbers. Dynamite charges were placed in the drill holes and these charges were exploded. Some time was required for the fumes and dust from blasting to be aired out.

A power shovel electrically operated, known as a mucking machine or tunnel shovel, rented from and operated by plaintiff, and also operating on the track, was then advanced into the tunnel or gallery; this machine was provided with

a power-operated shovel or dipper which operated to gather up the loose blasted material or muck which had been dislocated by the blast, and, by a process hereinafter more fully described, to load the same into transporting means, i. e., mine cars, at the rear of the mucking machine so that the excavated material could be transported out of the tunnel and to a tipple or dump and the car returned for further similar use. The labor for handling and dumping the mine cars was, under the contract, to be furnished by defendant.

After the material or muck made available at a particular face by a blasting operation had been thus cleaned up the tunnel-shovel machine was moved out of the gallery under its own power and the cycle of operations was again repeated by once more bringing the drill jumbo into proper position at the working face—short advance rails having, in the meantime, been laid.

3. The plaintiff and his shovel operators, and his superintendent and foremen were experienced in tunneling operations. The plaintiff had full and accurate knowledge when he submitted his bid and executed the contract of the loading capacity of the shovels per hour of actual operation at a face and the capacity or hourly rate of production in cubic yards of the equipment called for by the specifications, including the mine cars, under the terms and conditions set forth in the contract which contemplated and provided for the cycle of operations above set forth. In other words, when plaintiff made his bid and signed the contract he knew from his own knowledge and experience, and from accurate information obtained from others long experienced in like tunneling operations with the same or similar equipment, how long, during each hour, under the conditions existing and as set forth in the contract, hereinafter quoted, the shovels would each be engaged in actual mucking and loading operations at a tunnel face and about how many cubic yards of excavated material would be loaded and dumped an hour for 21 hours a day. (The contract specifications required three seven-hour shifts a day for approximately 25 days a month.)

Plaintiff took all the matters mentioned above and as set forth in the specifications into consideration and gave them

due and proper weight when he made his bid of a rental rate of $13.10 an hour, which was accepted, for the rental of two shovels, necessary mine cars, and associated facilities.

4. June 25, 1936, defendant issued an invitation for bids accompanied by a standard printed form of contract and detailed specifications, prepared especially for the project in connection with which bids were being solicited, for the rental of tunnel shovels, hand-trammed mine cars, and other facilities for use in connection with the project described in finding 1. The invitation stated that "Sealed Bids * * * will be received * * * until 11:00 A. M., July 7, 1936, * * * for rental and operation of tunnel shovels and attendant equipment, in accordance with the attached specifications." Bids were required to be submitted on the standard Government form of bid. The printed form of contract (Standard Form 32) was one intended for the manufacture or purchase of supplies and materials and certain of its printed provisions were not applicable to the work with which this case is concerned. Only Arts. 2 and 12 of the printed contract form are mentioned by the parties in connection with the issues in this case. These articles are as follows:

> ARTICLE 2. CHANGES.—Where the supplies to be furnished are to be specially manufactured in accordance with Government drawings and specifications, the contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings or specifications, except Government Master Specifications. Changes as to shipment and packing of all supplies may also be made as above provided. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or chief of bureau. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered unless the contracting officer shall for proper cause extend such time, and if the parties can not agreed upon the adjustment the dis-

pute shall be determined as provided in Article 12 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the contract as changed.

ARTICLE 12. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime the contractor shall diligently proceed with performance.

Article 2, above-quoted, was not applicable to the equipment called for by the specifications, and the work to be performed thereby, except to the extent that the contracting officer might, through a change and an equitable adjustment, have required plaintiff to manufacture and furnish larger mine cars, but he did not do this and he did not at any time purport to act under this article.

The specifications which accompanied the invitation as a part of the contract to be entered into with defendant by the successful bidder defined, in paragraph 2, the work to be done as follows:

> The work provided for herein consists of furnishing, operating, and keeping in repair, the necessary equipment to accomplish the removal of blasted material from the faces of the 130 galleries and one tunnel, having a combined length of approximately 18,000 feet and a combined volume of excavation of approximately 65,000 cubic yards.

With respect to the duration of the work and the duration of the contract, paragraphs 3 and 4 of the specifications stated as follows:

> *Duration of the work.*—The duration of the work is dependent upon conditions not directly connected with the operation of the equipment to be furnished under these specifications and cannot be guaranteed. During the period of operation of the equipment furnished it is intended that work shall be prosecuted on the basis of three 7-hour shifts per day, approximately 25 days per month. It is estimated that the blasting of the

> material in the galleries and tunnel will be accomplished in approximately 7 months, and bids under this specification will therefore be canvassed on the basis of 3,600 hours of operation. The Government reserves the right to employ the equipment a greater or a lesser number of hours as circumstances may require.
>
> *Duration of contract.*—The contract to be entered into shall be for a period of 7 months from the date of award, but may, at the option of the government, be extended upon the terms and conditions herein specified, * * * provided that the total period of contract and extension shall not extend beyond June 30, 1937.

The letter from the contracting officer notifying plaintiff that his bid had been accepted and that the contract had been awarded to him was dated July 17, 1936, and was received by plaintiff July 21, 1936.

The specifications contained the usual clause stating that the contractor or his representative should familiarize himself with conditions at the site of the work and should, by careful inspection, satisfy himself regarding all pertinent features relative to quantities, location, etc., and that maps and drawings showing the location and extent of the work were available at the United States Engineer's Office and might be examined by bidders.

Plaintiff visited the site and was familiar with conditions and the probable quantity of excavation and the circumstances and physical conditions under which the equipment to be furnished and rented would have to operate.

Paragraph 10 of the specifications defined the plant to be furnished in the following phraseology:

> The contractor shall furnish the following plant and equipment:
>
> *a. Tunnel shovels.*—Two or more tunnel shovels of an approved design shall be provided for use on the work. * * * When removing blasted material from a working face, each shovel shall be capable of loading such material into approved mine cars at a rate which shall not be less than twenty (20) cubic yards per hour, provided that no single piece of such material shall exceed 3 cubic feet in size and that cars to receive the material are available for loading as specified under Subpar. *b* below. Each shovel shall be fully capable of

cleaning up the full width of the gallery or tunnel in which work is being conducted without the use of auxiliary equipment or labor. * * * It [referring to each shovel] shall be electrically driven, and provided with motors of a standard type and ample power capable of operating on 220 volt, 60 cycle, three phase alternating current. * * * In cases where movement of a shovel is necessary beyond a distance of 1,000 feet from the power connection provided, movement shall be accomplished by motive power supplied by the government.

b. Mine cars.—Cars of an approved type and having a capacity of not less than one cubic yard nor more than 1½ cubic yards shall be furnished by the contractor. The number of such cars to be furnished shall be determined by the contractor on the following basis: (1) That cars shall be trammed by hand by labor furnished by the government; (2) That the distance to dumping area to which cars are trammed, as designated by the contracting officer, shall not exceed 500 feet from the designated loading point, and (3) that a sufficient number of cars shall be furnished to insure that no delay of more than one (1) minute shall occur in the operation of the tunnel shovel as a result of the unavailability of empty cars, provided that such unavailability is due to causes beyond the contractor's control. Cars shall be fitted with suitable roller-type wheel bearings, or equal non-friction type, and shall be capable of dumping in a manner satisfactory to the contracting officer.

c. Track system.—It is expected tunneling work will be prosecuted in two general areas and in adjacent groups of galleries in each area. In order that work may be carried out under these conditions, the contractor shall furnish, install, and maintain sufficient trackage and accessories to insure the efficient movement of the tunnel shovels between working faces and the movement of mine cars between working faces and between face and dump and return. The arrangement of trackage shall be such that at all times the tunnel shovels and cars shall be capable of moving between successive working positions, as directed by the contracting officer. Sufficient trackage shall be provided and installed to permit within each of the two operating areas the immediate operation of the shovel and cars in any one of 10 adjacent galleries in which drilling, blasting, and mucking is in progress. Sufficient additional trackage shall be provided and installed to permit immediate advance of shovel and cars to

a new working position in a new group of galleries, provided that the new working position shall not ordinarily exceed 1,000 feet from the nearest adjacent gallery in which work is being prosecuted. The government shall have use of the track system for such purposes as desired by the contracting officer until the full depth is reached in each tunnel. Trackage for movement of cars shall be so arranged that empty cars can be spotted at the shovel within not more than 1 minute after a loaded car has been removed therefrom and trackage shall be provided for a maximum distance from any working face to dump not to exceed 500 feet. Track and fittings shall be of a standard type and of sufficient strength to carry the loads expected. Trackage shall be installed in a manner which, in the opinion of the contracting officer, is satisfactory to permit easy hand tramming of mine cars. A sufficient number of temporary cross-overs shall be provided in trackage outside the tunnel portals to permit use of vehicles operated by the government on the road system.

5. The shovels, mine cars, and track system, including the loading capacity of the shovels, the dumping arrangement on each of the mine cars, and the dumping arrangement or tipple of the track system, fully and completely met and fulfilled every requirement and condition of the foregoing paragraph 10 of the contract specifications.

6. Paragraph 11 of the specifications provided for the services to be furnished by plaintiff and the costs to be borne by him in connection with the rented equipment as follows:

a. The contractor shall furnish all necessary personnel and materials and bear all costs of operating tunnel shovels, including operators, assistants and oilers, lubricants, maintenance, renewals, and repairs, except that electric power will be furnished by the government.

b. The contractor shall furnish and bear all costs of maintenance, renewals, and repairs of mine cars, the necessity for which will be determined by the contracting officer, provided that cars damaged while being operated by government personnel will be repaired at the expense of the government.

c. The contractor shall furnish and bear all costs of maintenance, renewals, and repairs of track equipment and accessories and all costs of placing and maintaining same in order to insure compliance with provisions of Par. 10 above.

7. Paragraph 12 of the specifications sets forth the contract terms with reference to the computation of rental time as follows:

Rental time.—For the purpose of computing rental time, the equipment furnished shall be considered as being in two lots, each lot to consist of one or more tunnel shovels and the proportion of attendant equipment necessary to comply with the requirement of Par. 10. Rental time shall be computed daily on each lot described above, one-half of the bid hourly rental rate being considered the rental rate for each lot. In computing the rental time on a lot only the time during which the lot is actually in use and operating at full capacity, as specified in Par. 10 above, will be considered, provided, however, that if failure to operate at full capacity results from the fact that blasted material is not available for loading operations, or is of a size larger than the maximum herein specified, no deductions shall be made from rental time of that lot. Determination of the car loading rate of a shovel as specified in Par. 10 shall be made on the basis of actual performance during each period of operation at a working face. * * * Time lost because of necessary repairs, replacing parts, greasing or breakdowns of equipment will not be paid for, and a charge at a rate equal to one-half the bid hourly rental rate shall be made for each lot for all periods of delay resulting from these conditions. If major equipment of a lot is injured as a result of an accident or cause beyond the control of the contractor, and progress of the work is delayed thereby, rental at the agreed rate shall continue for such time as is determined by the contracting officer to be reasonable to permit furnishing a replacement or to return equipment to full operating condition by repair, provided, however, that in no case shall rental under this provision extend for a period in excess of fifteen (15) days. The decision of the contracting officer as to the number of hours per day which shall constitute the working period for which rental is chargeable shall be final.

8. Paragraph 5 of the specifications was as follows:

The contractor shall state in his bid the period of time in calendar days within which he will agree to commence work at full capacity as specified herein, time being reckoned from the date on which he receives notice to proceed. Because of the necessity of initiat-

ing the proposed work at the earliest possible time, date of commencement will be given due weight in canvassing the bids by adding to the total amount of each bid the sum of $200 per day for each day in excess of the shortest time proposed in the various bids for commencing work at full capacity. The time within which work can be so commenced, as named by the successful bidder, will be made a part of the contract to be entered into.

In the event of the failure on the part of the contractor to commence work at full capacity within the time agreed upon, the contractor shall pay the government as liquidated damages the sum of $200 per calendar day of delay in so commencing work. The decision of the contracting officer in the matter of what constitutes commencement of work at full capacity under this specification shall be final.

9. Paragraph 14 of the specifications provided that "If the operation of the equipment furnished proves to be unsatisfactory to the contracting officer under the provisions of this specification, the Government reserves the right to require the contractor to operate the equipment until such time as satisfactory equipment can be provided." All the equipment furnished by plaintiff fully and adequately met and conformed to all the terms and requirements of the contract and specifications, and was entirely satisfactory under the provisions thereof as contemplated and intended by paragraph 14 above quoted.

10. Paragraph 15 of the specifications provided as follows:

Annulment.—This contract may be annulled at any time by the contracting officer for any of the following reasons. Unsuitability of equipment or operators to perform the work required, failure of contract or operators furnished to cooperate with the government to secure the highest quality of workmanship and progress on the work; or should the contracting officer decide to keep the contract in full force, he reserves the right, under the requirements of this specification, to condemn as unsuitable any equipment or operators and to replace the same with suitable equipment and/or operators and charge the excess cost thereof to the contractor. Thė decision of the contracting officer as to the suitability of equipment and operators, and as to adequacy of cooperation, shall be final.

11. On July 7, 1936, plaintiff submitted a bid on a form prepared by the Government in which he offered to furnish two #30 Conway shovels; twelve (12) new mine cars of one cubic-yard capacity, equipped with roller-wheel bearings; 20-pound and 40-pound track, and five (5) turntables. The bid, in addition, gave the number and classification of the crews to be furnished by plaintiff.

In accordance with the schedule in the bid, which required both the unit price and the amount to be shown, the bid provided for the rental and operation of the two shovels and attendant equipment in accordance with the specifications at a unit price an hour of $13.10, which showed a total price for 3,600 hours of $47,160.

Plaintiff also set forth in this bid, in accordance with a requirement therein, that within 32 calendar days after date of receipt of notice of award he would "be ready to operate at full capacity under the provisions of the specifications." This provision of the bid was made a part of the contract by paragraph 5 of the specifications and Art. 1 of the contract.

Plaintiff's bid was duly accepted by defendant as made.

12. July 17, 1936, plaintiff and defendant, acting through R. C. Crawford, Lt. Col., Corps of Engineers, U. S. Army, War Department, as contracting officer, entered into a written contract, which included the specifications, in accordance with the invitation and bid. The contract was also signed by Col. T. H. Jackson, Division Engineer, Corps of Engineers, U. S. Army, South Pacific Division, on August 1, 1936. On July 17 defendant mailed plaintiff notice of award in which plaintiff was advised that "your bid * * * for rental and operation of tunnel shovels and attendant equipment in strict accordance with the specifications is hereby accepted * * *. In accordance with your bid, delivery of the shovels and attendant equipment is to be made within 32 calendar days from date of [receipt of] notice of award." This notice was received by plaintiff July 21, 1936. On the same day, July 21, plaintiff delivered to defendant a performance bond in the sum of $23,580 with the United States Fidelity and Guaranty Co., as surety.

Under Art. 1 of the contract it was stated that the con-

tractor should "furnish and deliver, on a rental basis, for a period of seven months, the following:

> Two (2) #30 Conway Shovels and Five (5) Turn Tables.
> 20 Gallery Operation and main lines with crew consisting of:
>
> One Maintenance Foreman per shift.
> One Tract Foreman per shift.
> Three Tract Men per shift.
> Six Conway Operators per two shifts.
> One General Superintendent.
>
> for the consideration stated. All for the unit cost of $13.10 an hour. In strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: * * * The complete equipment with attending crews shall be ready to operate at full capacity, at Aliamanu Crater, within 32 days after date of receipt of notice of award."

13. Plaintiff had until August 22 to commence operating the equipment at full capacity, but he had the right, with the consent of the contracting officer, to commence operations at any time after receipt of notice of award in order to have all of such equipment operating at full capacity, as contemplated by the contract and specifications, on or before August 22, 1936. This consent was given and operations with one shovel were commenced August 15. The second shovel was placed in operation on Monday, August 17.

14. Plaintiff had all the equipment, including the two 30 hp. Conway shovels and mine cars called for and specified by the contract, on the site prior to August 15, 1936. Also prior to that date suitable track facilities were on hand for all work called for and tracks had been laid at the places where certain galleries or tunnels were to be first blasted and excavated. In addition to this equipment, plaintiff had at or near the site one 60 hp. Conway tunnel shovel as a spare, or extra, and a supply of spare parts, together with a number of standard Koppel mine cars, each of which had a capacity of two-cubic yards. These mine cars had roller-bearing wheels. This extra equipment was not called for by the contract but was brought as a protection to plaintiff against unforeseen contingencies and not for use on the job in the place of or in addition to the two shovels and other

equipment called for, unless one of the 30 hp. shovels became inoperative, or unless the Government desired to rent it on some basis satisfactory to plaintiff for use on this or other tunneling operations. These shovels were not new, and had been previously used. However, before being brought to this job, they were each taken apart and rebuilt at Los Angeles, California, just prior to being shipped to Honolulu. At that time every part of the shovels which showed wear was replaced with a new part. Practicaly the entire operating mechanism of the shovels was new. The shovels were otherwise in perfect condition, and capable of fully performing the work.

There were sixteen approved mine cars, each of which had a capacity of 1 $\frac{1}{20}$th cubic yards, for use with the two 30 hp. shovels, and the eight extra Koppel mine cars above mentioned, for use with the 60 hp. shovel. These shovels had been especially designed and constructed when they were rebuilt for use only with the small capacity mine cars. The 60 hp. shovel could operate with the smaller mine cars mentioned. Plaintiff also had on hand an adequate supply of adequate and suitable 20-pound and 40-pound track and turntables for the job, together with a sufficient number and kind of spare parts for the shovels to enable them to perform the work as called for, barring unforeseen and unanticipated events. These items of equipment are referred to in detail in the subsequent findings.

15. *The Conway shovels.*—Conway shovels are standard equipment throughout the world for this type of work. They consist of a heavy steel frame or chassis similar to a mine locomotive, upon which is mounted a 30 hp. electric motor, together with the necessary gearing, clutches, and operating mechanism for the shovel. At the front end of the chassis is pivotally mounted a forwardly projecting dipper arm or boom, this boom being provided with a dipper shovel at its front end. The arm, or boom, is designed as a trough or channel through which the excavated material moves from the shovel or dipper to the front end of the conveyor system when the boom is elevated and the contents of the dipper are emptied therein.

A belt conveyor system to carry the material extends from the rear end of the dipper arm or boom diagonally upward and to the rear end of the shovel, the belt conveyor terminating at a position immediately above the mine car, which is coupled to the rear of the shovel. The conveyor belt on these shovels was about 22 inches wide. The conveyor mechanism of these shovels was especially designed and constructed just prior to this job for use especially with the small one cubic yard mine cars. It did not extend rearwardly more than 36 inches from the upright supports at the rear of the shovel.

The shovel is controlled by a single operator standing on the platform on the side of the shovel. Two foot pedals control the forward- and backward-tramming movement of the shovel and attached mine car along the track, each of these pedals operating an appropriate clutch and planetary gearing to control the application of power to the axle of the shovel through a driving chain and pinions. The application of power is such that the operator by applying various degrees of pressure upon the clutch pedals may tighten the appropriate clutch band to any degree and, therefore, the operator has under his direct control a full or partial application of power through the various pinions, gears, and chains.

The dipper boom and associated shovel, or dipper, have no fore and aft movement relative to the chassis of the machine and in order to fill the dipper shovel the entire mechanism must be advanced or trammed along the track toward the muck pile.

The dipper is pivoted to the outer end of the boom and the boom is pivoted at its inner end to the lower front of the shovel machine so that the boom and dipper may be swung from side to side. Two chains run forward from the top framework of the machine to the upper corners of the shovel or dipper. These two chains are connected to a hoist unit, which consists of two separate systems of planetary gearing, each one being equipped with a drum around which the chain is wound. These two sets of gearing are also controlled by clutches or brakebands operated by two hand

levers adjacent to the operator's position. By manipulating these levers simultaneously, or either one separately, the dipper can be raised or lowered or swung from side to side, or placed in any suitable position. The amount of power applied to the chain drums is dependent upon the degree of pressure the operator applies to the hand levers.

The entire mucking or excavating operations of the machine and dipper are comparatively smooth, and with experienced and expert operators, such as plaintiff had on the job, there is no bouncing, jerking, or jarring of the shoveling machine, and no undue stress and strain on its operating parts. The operator by means of the hand levers lifts or lowers the dipper as it is pushed into the blasted material, and by means of the foot pedal operates the machine so as to "feel his way" into the muck pile.

The various controls are so located with reference to the operator that he faces the front or dipper end of the tunnel shovel during its operation.

The electric power is supplied to the machine by means of a long, flexible, heavily insulated cable.

16. After each blasting operation the shovel is advanced toward the working face, the track, consisting of 40-pound rails, having been laid as close to the face as is practicable before the shooting. As the shovel advances it first cleans the track in front of it, and the boom is then swung to the right and left to clean up what is known as the "fly rock" or material which has been shot out from the working face.

When the shovel reaches the main muck pile the operator crowds the dipper into the loose material, as above stated. This is done by tramming the entire mechanism forward, the operator applying an appropriate pressure on the foot pedal for this purpose and, in effect, feeling his way into the pile.

When the dipper is full, it and the channeled arm, or boom, are elevated and the load is automatically deposited on the conveyor belt which carries the muck back to the rear and deposits it in the mine car. While this is being done the operator slowly trams the machine rearwardly a few feet and then advances and pushes the dipper into the muck pile

to pick up another shovelful, the boom being swung to the right or left until the muck pile is loaded. As soon as the mine car is full it is uncoupled, trammed away, and replaced by an empty car.

The conventional operation of the shovel calls for a reciprocating or shuttling tramming motion forwardly and rearwardly along the tracks as each shovelful is picked up. As the mine car is coupled to the rear of the shovel its movement is at all times synchronous with that of the shovel, and it is always in proper position relative to the discharge end of the conveyor belt. The rear end of the conveyor system is designed as to height and length to suit the type of mine car in use in each individual instance, and this was done in the present case when the shovels were reconditioned and rebuilt just prior to their shipment to Honolulu.

17. The construction and operation of the 60 hp. spare Conway shovel hereinbefore referred to, which formed a part of plaintiff's spare equipment, was identical to that of the 30 hp. shovel just described, the only distinction being that it was larger and more powerful and had a greater capacity. Illustrations of the Conway shovels are contained in plaintiff's exhibits 7 and 8.

18. *Mine cars.*—The 16 mine cars for the two 30 hp. Conway shovels were constructed by plaintiff in Honolulu, after having been approved by defendant. The mine cars consisted of a rectangular open-top steel body, the dimensions at the top being somewhat larger than the dimensions at the bottom. The bottom of the cars was covered with a layer of heavy hardwood planks. Each mine-car bed was at least 2 feet deep; 2 ft. 10 in. wide at the bottom; 3 ft. 8 in. wide at the top, and 4 ft. long. The car was equipped with flanged wheels approximately 20 inches in diameter.

The rear-end section of the car was horizontally pivoted at the top so as to swing outwardly and discharge the contents when the car was placed in an inclined position on the tipple. A sliding-bolt latch was provided for normally locking the end in place. This was a conventional dumping arrangement and was entirely adequate and suitable for the purpose intended. With this dumping arrangement the car was capable of dumping in an entirely satisfactory manner.

The car was provided with two axles and four wheels mounted thereon by means of roller bearings, these wheels being flanged so as to run on the 36-inch gauge track provided by plaintiff. Tests and demonstrations showed that these cars, when loaded, were capable of being easily trammed or operated by one man, one test indicating a drawbar pull on an approximately level track of 76 to 83 pounds to move the car when fully loaded with bags of cement weighing a total of approximately 800 pounds. The blueprint drawing of the mine cars was approved by defendant before they were built and they fully met and conformed to every requirement of the contract. When properly trammed and handled they operated perfectly. They were not at any time mechanically defective in any way.

The coupling ordinarily utilized to connect the mine car with the Conway shovel in order to synchronize its movements therewith is of the pin and link type. The fixed element of this coupling consists of a pair of horizontally extending flanges or lugs spaced vertically apart to form a recess between them, the upper and lower lugs having holes in them in vertical alignment to receive a vertical coupling pin. One pair of lugs is fixed to the rear of the shovel and a second similar pair is fixed to the front end of the mine car.

A link or drawbar of proper length extends between the car and shovel, its ends extending into the recesses formed by the fixed lugs on the car and the shovel. Holes at each end of the drawbar register with the coupling pin holes extending through the lugs so that the coupling pin when inserted holds the end of the drawbar in position. The holes in the drawbar are sufficiently large to allow the necessary play and flexibility.

The coupling lugs on the Conway shovels furnished by plaintiff were of the conventional type with upper and lower flanges drilled to receive the coupling pin. The construction of the end of the coupling on the car is not entirely clear from the record. It appears to have comprised a member of half round metal which extended underneath the bottom of the car and was welded there. The plain-

tiff personally made the mine-car drawbar, which was a piece of flat structural steel.

During presentation of testimony Captain Hill, the Army engineer in charge of the project as the authorized representative of the contracting officer, sought to make, for the first time, some criticism of the coupling arrangement, stating that the coupling member between the mine car and the shovel was not of the proper length. This objection is not convincing and it is contrary to the greater weight of the credible evidence. No objection to the coupling member was raised at the time plaintiff began his operations or at any time thereafter prior to 1940 when the evidence was taken, and had such objection been made it was well within the skill of the ordinary mechanic to make a drawbar of a different length, to drill different sized holes in the drawbar or to relocate the fixed portion of the coupling at any suitable position on the front end of the mine car. This could have been done in a very short time if it had been necessary or advisable, and would not have delayed commencement of operations at full capacity within the time allowed by the contract.

19. *Track.*—Plaintiff furnished approximately 450 20-foot sections of used 20-pound steel track to be used for tramming purposes.[1] These sections were complete in that they consisted of two rails mounted in properly spaced parallel relationship on stamped steel cross ties located on 3-foot centers. This type and weight of track is used extensively on the sugar plantations on the Island of Oahu and is sufficiently heavy to bear the weight of the locomotives used on the sugar plantations, and which weigh as much as 12 tons. The 30 hp. Conway shovels weigh approximately 10 tons each. This 20-pound rail was in good condition. It was of sufficient weight and strength, and was entirely suitable and adequate under the provisions of the contract for the purposes for which it was designed and intended to be used under the requirements of the contract.

The 40-pound rail furnished by plaintiff was new rail.

[1] The term 20-pound track or 20-pound rail as used in these findings designates the weight of rail per unit length and therefore indicates its size and strength.

This was in short lengths and was intended for use at the working faces in the tunnels. This rail is known as crowd rail and forms that portion of the track upon which the Conway shovel moves back and forth as it excavates the muck pile. As the working face advances in the tunnel, sections of this rail are laid in front of the shovel and are removed in the rear and replaced by the 20-pound rail.

The track lay-out utilized for a set of galleries is shown in plaintiff's exhibit 21–A. Defendant approved this track lay-out. It comprised, in brief, a section of main track in front of and parallel to the portals of a set of galleries. From this track a series of switches, with curved sections of track, led to the individual straight track in each gallery. A turntable was located in the center of the main track by means of which mine cars could be placed on a track at right angles thereto, this track running to a tipple or dump.

20. The tipple or dumping device which plaintiff provided comprised a separate section of track located at the end of the dump track. This section was pivoted on a shaft slightly off-center. The track at the end of this section was bent up so as to engage and fit around the wheels.

When the loaded mine car was placed on this pivoted section of track, it permitted the car to tilt down at an angle of not more than 60 degrees. When the latch on the end of the car was tripped, either before or after the tipple was tilted, the end swung open and the car discharged its load. The tipple section was so counterbalanced that after the load was discharged the tipple and car automatically came back into position. This was a conventional type of tipple construction. The tipple was tested many times with loaded cars before work was commenced, and it was tested with a loaded car after the work was commenced, and in every instance it worked perfectly.

21. *Spare parts.*—Due to the fact that it would take time to obtain replacement parts from the mainland, an extra amount of replacement parts and spare parts which plaintiff considered would be necessary, and which were more than sufficient to meet all normal contingencies, was shipped with the 30 hp. Conway shovels. These included extra clutch bands, drive chains, hoist chains, conveyor belts, extra pin-

ions, gears, and clutch drums, and two spare 30 hp. motors. Except for defendant's breaches of the contract, this supply of spare parts would have been more than sufficient to complete the work with the shovels as the contract provided it should be performed.

22. Plaintiff's personnel included the required number of expert operators and mechanics who were familiar with the operation and mechanism of Conway shovels. These men came from the mainland especially for this project. No such mechanics were available in the Territory of Hawaii.

23. On or prior to August 14, 1936, defendant had blasted some material, for the removal of which plaintiff's equipment had been rented. On the 14th the contracting officer's consent was given for plaintiff to commence operations, and plaintiff made arrangements to start operations with one of the shovels and the mine cars at 3 p. m. on the following day, Saturday, August 15. Early in the morning of the 15th, after leaving instructions with his men to get everything in readiness for commencement of operations, plaintiff went to Honolulu, a distance of 3 or 4 miles, on business, intending to return before 3 p. m. About 8 a. m., or shortly thereafter, the contracting officer, Lieutenant Colonel Crawford, came to the site where the work was to be performed. He was there about half an hour. During this time defendant's superintendent, Van K. Drouillard, a civilian, was not at the site, neither was the contracting officer's authorized representative in charge of the project, Capt. Bruce E. Hill, present. During the half-hour that Colonel Crawford was present, operations had not been commenced. The shovel was not operated during that time. Apparently some of the men were cleaning up some scattered blasted material, and they loaded some of the 1-cubic-yard mine cars. Colonel Crawford states that he observed a hand-loaded car being trammed and dumped by several of the Government's laborers. The men whose duty it was to handle and dump the mine cars were inexperienced in such work. For this reason they required some time and an opportunity to become familiar with the handling of the mine cars and the operation of the tipple. Colonel Crawford knew this. The men whose duty

it was to handle the mine cars were laborers employed locally by defendant. The contracting officer states that he estimated that nearly 15 minutes were consumed by these men in tramming, dumping, and returning this mine car. Why this was so he did not know and he made no investigation or inquiry of anyone concerning the matter.

24. After the contracting officer left the site, the defendant's superintendent arrived. Shortly thereafter he started operations with the shovel loading the mine cars. Four or more mine cars appear to have been loaded by the shovel. Defendant's superintendent observed one mine car trammed, dumped, and returned by four or five of defendant's laborers. He estimated that they consumed from 10 to 15 minutes in the operation. He knew the men were inexperienced in such work. He made no investigation or inquiry as to why they had taken this length of time to dump and return the car. He did not at that time ascertain or conclude that there was anything wrong with the mine cars or the tipple, or that the time consumed by the men was due to any mechanical defect of any kind. On the contrary, he knew that the amount of time used in tramming and dumping this car was due entirely, first, to the inexperience of the men, and secondly, to the inherent slowness of handling material by the mine-car process. Thereupon, he suspended all operations for the purpose of considering and deciding what action should be taken to speed up the work by taking away the material as fast as it could be excavated by the shovel. At that time several loaded mine cars were standing on the tracks, and they were not dumped as a result of his decision to abandon the use of mine cars. After thinking over the matter for a few minutes, defendant's superintendent, in the absence of plaintiff and without notice to him, discarded the mine cars, abandoned their use and substituted automobile dump trucks therefor, and ordered the work to proceed with the use of trucks which were supplied and operated by defendant. The abandonment of the mine cars and the use of trucks instead was a breach of the contract. The decision and action of defendant's superintendent were never changed but were approved and adhered to by the contracting officer throughout and until the work was completed.

25. Plaintiff arrived on the site about 10 a. m., soon after the automobile trucks were placed in operation in place of the mine cars. He immediately made a vigorous protest to defendant's superintendent, insisting that his action was a breach of the contract; that he would not stand for the use of the trucks, and that such use constituted a destruction and repudiation of the contract by the defendant. He observed that a truck being operated under the conveyor at the rear of the shovel had torn the conveyor belt about 8 feet. Thereupon plaintiff ordered his men to stop work and to get off the job. He demanded of defendant's superintendent a statement as to his authority and reason for discarding the mine cars and using trucks. His reply was that the mine cars wouldn't work because they were too slow; that it took too much time for defendant's men to tram and dump them to enable the work to be completed within the time available. Thereupon plaintiff stated to defendant's superintendent that he knew there was nothing wrong with the mine cars or the tipple, that he would demonstrate with a loaded mine car that they worked properly, and that they could be easily and speedily trammed, and dumped. Plaintiff without assistance and in the presence of defendant's superintendent took hold of a loaded mine car, trammed it to the turntable, revolved the turntable, trammed the car to the tipple dump, pulled the latch on the dumping arrangement of the car which permitted the end of the car to swing open, tilted the tipple, which caused the car to empty its contents, and trammed the empty car back, all without the slightest difficulty and in a very short time. The car, the track, and the tipple operated and worked perfectly. Immediately following this demonstration, plaintiff continued his protest to defendant's superintendent, but he would not change his decision not to use the mine cars. At this point, Captain Hill, the contracting officer's authorized representative in charge of the work, arrived, and plaintiff protested to him as he had to defendant's superintendent. These protests of plaintiff were answered by Captain Hill by threats of incarceration in the guard house on the military reservation if he interfered in any way with the prosecution of work with the use of trucks with the tunnel shovel in place of mine cars. Thereupon Captain Hill or-

dered the men back on the job and to proceed with the use of the dump trucks. These were heavy trucks with steel bodies. When Captain Hill ordered that the men get back on the job and proceed with the work, plaintiff left the site of the work and later in the day, or on the following day, protested to the contracting officer, explained the entire matter to him, furnished him with the true facts, pointed out the contractor's rights under the contract, and insisted that the action which had been taken was a breach of the contract because there was nothing wrong with the equipment or the mine cars, and that the substitution of the trucks constituted a repudiation and destruction of the contract. At that time the contracting officer had conferred with his representatives, and his reply to plaintiff's protest was that he approved the action that had been taken; that the mine cars would not be used on the job because they were too slow and that the trucks would be used instead; that the contract gave him the right to take that action or any action which was in the interest of the Government and which would speed up completion of the work. Thereafter plaintiff had practically no authority in connection with the operation of the equipment, except to keep it in repair and pay the bills. Plaintiff continued from day to day to protest to the contracting officer without effect, receiving only the replies that the contract gave the contracting officer the right and authority to take the actions complained of; that his decisions were final, and that plaintiff could do nothing about it.

26. The only reason given to plaintiff at the time and thereafter for substitution of the 2 cubic-yard automobile dump trucks for the one cubic-yard mine cars was the inherent slowness of removing muck by the hand-tramming mine car process, and never, at any time, did the contracting officer, or anyone acting for him or for defendant assert or decide or notify plaintiff that there was any actual or alleged mechanical defect in the construction or operation of the mine cars. There was no mechanical defect in the construction or operation of the mine cars. They complied in every way with the requirements of the contract, and these facts were at all times known to the contracting officer and his

representatives on the job. Plaintiff requested a written ruling in the matter of the mine cars, but none was given.

27. The action taken by the contracting officer was not of a character that plaintiff had any cause, under the terms and conditions of the contract, to expect on the job. The substitution of the automobile trucks for the mine cars was an arbitrary and unauthorized act under the facts and the terms of the contract, and the decision of the contracting officer which resulted in this being done was so grossly erroneous as to imply bad faith.

28. The trucks used in conjunction with the Conway shovels at the beginning of operations, and for some time thereafter, were Chevrolet and International trucks of 2 and 3 cubic-yards' capacity, but for the majority of muck removal Chevrolet trucks of 2 cubic-yards' capacity were used.

Serious damage was done to all three Conway shovels by the use of automobile trucks. The damage which occurred to the shovels was due to inability to properly synchronize the movement of the trucks with the movement of the shovels when the latter were in operation.

As set forth in detail in finding 16, conventional operation of the shovel necessitates a reciprocating or shuttling or tramming action forwardly and rearwardly along the tracks as each shovelful is picked up, the mine car by virtue of being coupled to the shovel being at all times in the proper position under the conveyor belt to receive the muck carried thereby. With the use of trucks, however, it was impossible to synchronize the forward and rearward movement of the trucks with the forward and rearward movement of the shovels. In order to keep the truck body under the end of the conveyor belt it was necessary for the truck to back as the shovel approached the muck pile and the truck to move forward as the shovel moved rearwardly away from the muck pile. The operator's position on the Conway shovel required him to face the muck pile, and the truck driver's position in the truck to properly manipulate the clutch and brake pedals and the gear shift required him to face the opposite direction.

As a consequence, collisions occurred between the rear of

the truck and the rear of the Conway shovel during about 50 percent of the time during which the shovel was excavating. Attempts were made to minimize the effects of these numerous collisions by using sleepers or railroad ties mounted on the end of the Conway shovel, but these became splintered and broken and were subsequently replaced by old tire casings.

These collisions, especially when the truck and Conway shovel were backing at the same time, resulted in severe damage and abnormal wear and tear, particularly on the power and transmission system of the Conway shovel. The sudden shock of the collisions was an added strain to such elements of the transmission system as the links of the drive chains, teeth of the pinions and gears, the motor drive, and even the windings of the electric motor itself.

On numerous occasions drive chains were broken, king pins broken, gears stripped, and in the first 10 days of operation two motors of the two 30 hp. Conway shovels had to be replaced by the spare motors and rewound.

The breaking of the drive chains was due to the fact that these chains would be taut while the machine was being backed, and when the truck came in contact with the shovel and gave it a bump forward there would be a sudden shock to the chains which would break the pins of the chain as well as the links.

If the truck backed into the shovel at the time the shovel was feeling its way into the muck pile, a sudden shock would be thrown on the hoist chains of the shovel, and these at times were broken.

29. The conveyor system and the conveyor belts of the Conway shovels were also severely damaged by the use of the trucks. The rear end and the side of the trucks frequently collided with the uprights which supported the rear end of the conveyor system and these were bent and thrown out of alignment.

With the lack of synchronous operation of the trucks with the shovels that portion of the conveyor belt which had passed over the end roller of the conveyor system would frequently be dragged back and forth through the accumulated muck in the truck body, the bottom of which was much

higher than that of the mine car. These belts were badly cut by reason of this and had to be replaced frequently.

The conveyor system of the Conway shovels used on this project was especially designed to be used with the mine cars of the type specified in the contract. Where a Conway shovel is intended to be used with a truck, a special type conveyor system is used which extends far to the rear of the shovel to prevent collisions, and sufficiently high to prevent damage to the conveyor and belt. Such a conveyor system so designed as to be capable of being used with a truck is illustrated on the lower part of page 4 of plaintiff's exhibit 8.

At the conclusion of this abnormal use of the Conway shovels, despite frequent repairing and replacing of parts, all three shovels were reduced to a junk value, and as late as June 1940 were still in a junk yard in Honolulu, where they were examined by the Commissioner of this Court.

30. Instead of permitting the Conway shovels to clean up the blasted material and the fly rock as it advanced toward the working face subsequent to a blast, which is the ordinary operational procedure when operating these shovels, as set forth in finding 16, and as was contemplated and intended by the contract, the defendant used heavy bulldozers for this purpose.

The bulldozer is a gasoline engine-propelled road-working machine of the tractor type running on heavy steel caterpillar treads and carrying at its front end a scraper blade capable of various adjustments.

After a blast these machines were sent into the tunnels in order to push the fly rock, loose débris, and muck into a compact pile at the working face prior to the entrance of the Conway shovel. The caterpillar treads of the bulldozers threw the rails of the track out of alignment, bending them, tearing them loose, and, in addition, bending the pressed steel cross ties.

In addition to the automobile trucks and bulldozers used in the tunnels, defendant also used gasoline-operated caterpillar tractors to move the drill jumbo in and out of the tunnels. These tractors were used solely for the purpose of speed. They also damaged the track. The use of these

machines in the tunnel for the purposes mentioned was a breach of the contract which plaintiff protested to the contracting officer without avail. The use of these heavy tractor machines in the tunnels by defendant was responsible for abnormal damage to the tracks, a fact well known to and admitted by the contracting officer, which damage plaintiff was required to repair at substantial extra expense which is not established as to amount by the proof.

The automobile trucks used in the tunnels for the removal of muck also caused abnormal damage to plaintiff's tracks. These tracks were 36-inch gauge, and when material on the floor of the tunnel was loose in character a truck wheel running between the rails and over the stamped metal ties caused them to bend, thus throwing the track out of alignment. This damage to tracks of plaintiff by defendant's use of the tractors, bulldozers, and trucks in the tunnels caused frequent derailments of the Conway shovels, and plaintiff was penalized for the time thus lost, and, in addition, he was not paid rental during such time. Plaintiff was penalized a total of 53 hours and 14 minutes for aggregate delays to shovels due to their being off the track, and the use of the bulldozers and trucks was primarily and chiefly responsible for this lost time.

31. The causes and duration of delays, totaling 417 hours and 32 minutes, for which plaintiff was not paid rental and for which in addition he was charged a penalty of $2,755.87 which was deducted from amounts otherwise due under the contract with respect to shovels 1 and 2 are listed in defendant's exhibit 16, which is made a part of this finding by reference. Besides a delay of 53 hours and 14 minutes for being off the track, referred to above, other major delays for which plaintiff was also penalized and during which he was not paid rental were as follows: Due to conveyor belt, 58 hours and 52 minutes; electric motors, 105 hours and 19 minutes; gears, 28 hours and 32 minutes, and greasing, 20 hours and 20 minutes.

32. The delays of 417 hours and 32 minutes were caused by defendant as a result of its breaches of the contract. The rental lost by plaintiff under the contract as defendant required it to be performed by reason of these delays was $2,755.87.

33. In two or three weeks from the beginning of operations August 15, 1936, defendant's representatives, Colonel Crawford and Captain Hill, demanded and required plaintiff to replace the 20-pound rail with a heavier 30-pound rail. Plaintiff protested to the contracting officer that the 20-pound rail was adequate under the contract for the purposes intended; that the damage thereto was caused by the use of the trucks, tractors, and bulldozers, and that if defendant desired heavier rail it should pay for it. The contracting officer knew that the cause of the damage to the track and rails was as plaintiff contended, but he took the position that under the contract he had a right to require heavier rails to be furnished. This action by the contracting officer was arbitrary, unauthorized by the contract, and so grossly erroneous as to imply bad faith. Plaintiff supplied the new 30-pound rail at an extra cost, including labor, of $3,160.59. After plaintiff installed the 30-pound rail, damage to the track was still caused by the use by defendant of bulldozers, trucks and tractors, and derailments of the Conway shovels still occurred as before. Plaintiff protested about the damage done to the track before and after the change to the 30-pound rail.

34. The use of these various gasoline engine-operated devices by defendant and in particular the trucks which were in constant use during the operation of the Conway shovel caused pollution of the air by their exhaust fumes which contained carbon monoxide gas.

The Bureau of Mines in its Information Circular 6732, published in July 1933, made the following recommendation with respect to the use of internal-combustion engines (page 29):

> In the interest of safety, the United States Bureau of Mines recommends that:
>
> 1. Internal-combustion engines should not be used in any parts of mines and also should not be used in tunnels under construction because of the hazard of carbon monoxide in the exhaust gases, except—
>
> (a) When the air current is more than 100 linear feet per minute and the toxic gases are always less than 0.02 percent in the air current.

In the tunnels under construction and in which plaintiff was operating Conway shovels the approximate dimensions

were 10 x 10 feet. In a tunnel of such dimensions it would have required a ventilating blower system capable of supplying 10,000 cubic feet of air per minute in order to obtain the 100 linear feet per minute specified. The ventilating system provided by defendant had a capacity of 800 cubic feet per minute, or less than one-tenth of this requirement.

A carbon monoxide testing machine was used from time to time by defendant's representatives, and records of carbon monoxide content were allegedly kept. Defendant, however, produced none of these records, and upon inspection of the machine which was produced the lowest indication mark on the scale thereof was .05 percent.

Plaintiff's workmen became ill from time to time while working in the tunnels and some had to be assisted in leaving the tunnels.

On September 18, 1936, plaintiff's compensation insurance was canceled pursuant to the following written notice:

> DEAR MR. NEEDLES: I regret very much that it was necessary for us to cancel your Workmen's Compensation Insurance, but the type of work in which you are engaged is on our absolutely prohibited list. Further, to make the risk more undesirable, we understand that internal-combustion engines are used in this tunnel work.
>
> In view of all the facts, we feel that we cannot further remain on the risk.
>
> Very truly yours,
>
> INSURANCE FACTORS, LIMITED.

35. Early in October 1936 plaintiff's shovel operators went on a strike. At a consequent meeting of plaintiff and his employees one of the complaints made by the men was with reference to the atmospheric conditions in the tunnels.

The strike was terminated by a 25 percent wage increase.

36. Shortly prior to September 17, 1936, the contracting officer became desirous of further expediting the work, particularly of excavating the traffic tunnel located some distance from where work was then being carried on, and asked plaintiff to place the third 60 hp. shovel in operation on the job. This would have required a great deal of extra expense to plaintiff, if he had borne it, for laying additional tracks, for operators, etc. Plaintiff refused and stated to

the contracting officer that he would not place the third shovel on the job or consent to its being put in operation unless the Government paid him adequate compensation under the circumstances. Plaintiff was requested to submit a proposal of the conditions on which and the price at which he would agree to place the third 60 hp. shovel on the job. On September 17, 1936, plaintiff submitted a rental offer to the contracting officer with respect to the third shovel, which was as follows:

> I have carefully considered the proposal that the traffic tunnel be constructed by the use of two shovels and one operating crew mucking out alternately as the blasting proceeds. I have on the job two 30-horsepower shovels which are capable of turning on the short radius necessary under the present operation scheme. These two shovels constitute the two lots as contemplated in paragraph 12 of my contract. The proposal that the 60-horsepower shovel which cannot be operated in the galleries be used as one lot with the 30-horsepower shovel, figuring the traffic tunnel as an adjacent gallery, in the set-up would be in violation of the terms of my contract as set forth in paragraph 10a. I am perfectly willing to set this 60-horsepower unit in operation with a crew as a third lot to be operated by itself. However, it is very evident that if this shovel is to be used to muck out the traffic tunnel, time for drilling and blasting will interrupt the mucking operation to an extent that it cannot be profitably operated unless rental time is allowed for a full 21 hour per day during all time that the traffic tunnel is under construction with the usual exceptions for delays for causes beyond my control.
>
> All of the above remarks are based upon the assumption that it is feasible to operate one of these tunnel shovels on the grade proposed for the traffic tunnel from the down side. I doubt the feasibility of this operation and believe that the mucking will have to be done, if done with these shovels, from the upper and towards the lower. This, of course, would make it impossible to operate the 60 in conjunction with the smaller machine. It is also apparent that the traffic tunnel will still be under construction a long time after the adjacent galleries have been blasted and mucked out so that in any event it is proposed to operate three lots of shovels. Now, I propose this, that if you wish to rent the bare shovel on a per diem basis, I will rent you the 60-horsepower mucking machine and necessary

cars at $5.00 per hour net to me. The day to consist of 21 hours of rental time. You are to furnish all personnel and trackage and pay the necessary repairs during the term of rental, delivering the machine back to me at the end of the rental period in good operating condition; or I will operate the machine on a basis of 21 rental hours and furnish the operators, personnel and trackage as at present on the other machines for $10.00 per hour, rental to be considered all the time that digging operations, including drilling, blasting, ventilation and track laying, are being carried on. In case you wish me to make this a third lot, the offer is conditional on the ability of the machine to perform on the grade of the traffic tunnel in the manner you conclude to conduct operations therein.

37. Mine cars of one and two cubic-yards' capacity each were available for use with this shovel. Plaintiff's offer to rent the shovel to be used with mine cars, but without crews or trackage, at $5 an hour or $105 per day of 21 hours' working time was reasonable. The contracting officer refused plaintiff's offer and on Friday, October 2, 1936, ordered plaintiff to place the third 60 hp. shovel in operation under the contract at the traffic tunnel without additional rental, the position of the contracting officer being that the provisions of the contract gave him the right to require the use of the third shovel on the work. He appears to have taken the position that he could treat the three shovels as two lots under paragraph 12 of the specifications, which stated that "For the purpose of computing rental time [of $13.10 per hour], the equipment furnished shall be considered as being in two lots, each lot to consist of one or more tunnel shovels and the proportion of attendant equipment necessary to comply with the requirements of Par. 10. * * *, one-half of the bid hourly rental rate being considered the rental rate for each lot." This was the way the contracting officer computed the amount which he determined to be due plaintiff under the contract for the three shovels. The contracting officer arbitrarily ignored Art. 1 of the contract, which expressly called for only two 30 hp. Conway shovels at $13.10 an hour, and failed to consider the fact, which was well known to him, that the contract specifications which mentioned "two or more tunnel shovels" in Paragraphs 10 (a)

and 12 were written some time prior to the making of the bid on July 7, 1936, and the execution of the contract on July 17, 1936.

38. Following defendant's orders to plaintiff on October 2 to place the third shovel in operation on the job under the contract and plaintiff's refusal, the contracting officer on or about October 4 removed the 60 hp. shovel from its stored location, loaded it on a trailer and, with two tractors, hauled it to the site where it was to be placed in operation in the traffic tunnel and proceeded with preparations, such as laying of track, blasting, etc., for the operation of this third shovel. Plaintiff continued to protest this action as a violation and breach of the contract.

39. Due to the strain and overwork resulting from defendant's actions and its breaches of the contract, plaintiff became ill and collapsed on the morning of October 5, 1936, and was taken to the hospital in an ambulance. On October 7, 1936, plaintiff decided to abandon the contract by reason of defendant's breaches thereof and on that date notified the contracting officer of this action in a letter as follows:

> This is to notify you that due to the operating conditions which have been imposed on the contractor in violation of the terms of his contract, I find that it is impossible for me to continue to perform under the contract allotted me for the furnishing of excavation machines, track maintenance, etc., at the Aliamanu Crater.

On October 9 the contracting officer wrote plaintiff as follows:

> In reply to your letter of October 7, 1936, this is to advise you that it is impossible for the Federal Government to release you from performance under your contract No. W414–Eng–229 dated July 17, 1936, for the rental and operation of tunnel shovels and attendant equipment at Aliamanu Crater, Oahu, T. H.

40. Defendant continued the operation of the two 30 hp. shovels on the work as it had theretofore been carried on and also continued with preparations for operation of the 60 hp. shovel in addition. These preparations were completed and the 60 hp. shovel was placed in actual excavating operations on October 13, 1936. At that time work was

under way with the two 30 hp. shovels on a group of tunnels, identified as No. 41, located about 200 feet away from the portal of the traffic tunnel where defendant had placed the 60 hp. shovel in operation. Plaintiff's trackage necessary for operation of the third shovel was used by defendant. Plaintiff had sufficient and adequate trackage on hand and available at the site to lay the necessary 200 feet of track from tunnels No. 41 to the traffic tunnel had defendant graded the roadbed, which was one of its obligations, thus enabling defendant, had it so desired, to use the two 30 hp. shovels alternately in the No. 41 group of tunnels and in the traffic tunnel during drilling, blasting, and ventilating operations.

41. For some time the 60 hp. shovel was operated with plaintiff's operators simultaneously with the two 30 hp. shovels. Subsequently it was operated by a crew from one of the 30 hp. shovels, each shovel being alternately operated in a continuous process which resulted in two shovels (two 30's, or one 30 and the 60) being constantly engaged in mucking operations instead of one, as contemplated by and provided in the contract. In other words, the use of a third shovel avoided the necessity of moving a shovel from one blasted face to another. This operation of the third shovel resulted in damage to plaintiff. It saved a great deal of time and rental expense to defendant. It greatly increased the speed of excavating operations and the hourly rate of production, but all at the expense of increased wear and tear, and damage to plaintiff's machines.

42. The 60 hp. shovel was also operated under orders of the contracting officer in connection with trucks instead of mine cars, and, as a result of the use of trucks, the shovel suffered severe damage because of the resultant collisions (see findings 28 and 29). This shovel was especially designed, constructed, and intended for use with mine cars. A sufficient supply of adequate mine cars of one and two cubic-yards' capacity was available for use with this shovel.

43. The hourly rental rate of $13.10 for the two 30 hp. shovels as specified in the contract was not increased by defendant when it completed the work at plaintiff's expense after he had abandoned the contract. The use of the third

shovel had the effect of greatly decreasing the rental income under the terms of the contract. The use by defendant, under claimed authority of the contract, of plaintiff's third shovel, while the other two shovels were in good operating condition on the job was an arbitrary and unauthorized act under the express terms and conditions of the contract, and was so grossly erroneous as to imply bad faith.

44. This third shovel was used and operated on the job by defendant with plaintiff's tracks and crews and at plaintiff's expense under the contract, in the completion of the work from October 13, 1936, to January 7, 1937, both dates inclusive, a period of 87 calendar days, or 2 months and 28 days. During this period there were 72 working or rental days during which the 60 hp. shovel was operated 21 hours a day, or at least 1,512 rental hours. The fair and reasonable rental value to defendant of this 60 hp. shovel and other facilities was at least $6.70 per rental hour, exclusive of the damage to the shovel by use of the trucks, and such fair and reasonable rental value was $10,130.40 and plaintiff was damaged in that amount by reason of such use.

45. On October 14, 1936, after plaintiff had notified defendant on October 7 that he would not continue to perform under the contract and after defendant had placed plaintiff's third shovel in operation on the 13th, the contracting officer wrote plaintiff as follows:

> Reference is made to paragraph 15 of the specifications of your contract * * * for the rental and operation of tunnel shovels and attendant equipment * * *.
>
> It is hereby decided by the Contracting Officer that the equipment furnished by you under the above named contract is unsuitable because of a lack of an adequate supply of spare parts to keep said equipment in operating condition.
>
> In accordance with the right reserved in the above-mentioned paragraph, the Contracting Officer has decided to keep the contract in full force; to condemn as unsuitable all parts of said equipment which in the opinion of the Contracting Officer require replacement in order to perform the work required; to replace the same with suitable parts; and to charge the excess cost thereof to the contractor.

In reply plaintiff, while still in the hospital, wrote the contracting officer on October 21, 1936, as follows:

> Receipt is acknowledged of your letter of October 14th relating to my contract dated July 17, 1936, Contract * * * for the rental and operation of tunnel shovels and attendant equipment at * * *.
>
> As I have heretofore advised you in my letter of October 7th, I consider my contract with you terminated by reason of the violation of its terms by you. In order that you may have a record of what I contend are some of the violations of the contract, I call particular attention to the following:
>
> 1. The change of operations from the written contract, which contemplated the use of mine cars and hand tramming, to the use of gasoline trucks, over my protest;
> 2. The operation of trucks constantly colliding with the rear of the tunnel shovels, causing damage to the equipment, and consequent delays in repair;
> 3. Damage to the track and rails by use of trucks and Caterpillars;
> 4. Unsafe working conditions by reason of compelling men to work in tunnels 125 feet deep and inhale the fumes of running gasoline engines is not contemplated by the contract;
> 5. Improper and erroneous computation of penalties not in accordance with the terms of the contract, on past estimates;
> 6. The operation of three lots of machines instead of two, as contemplated by the contract;
> 7. Conditions of operations insisted on by your Resident Engineer, which neither I nor any other contractor can comply with.
>
> For the foregoing and other reasons I was compelled to notify you that I considered the contract terminated and my obligations thereunder discharged. * * *

46. October 24, 1936, the contracting officer wrote plaintiff as follows:

> Reference is made to your letter of October 21, 1936, relating to your contract * * * for the rental and operation of tunnel shovels and attendant equipment at Aliamanu Crater. I wish to reiterate that it is impossible to release you from the obligations of said contract.
>
> Article 12 of the contract provides for the settlement of disputes concerning questions of fact arising under

the contract. There is no record in this office that you have ever submitted a protest covering the purported violations of the contract set forth in your letter of October 21st. Actually, you have repeatedly concurred in those conditions of the operation which you now define as violations of the contract. In any event a written appeal to the head of the department has always been open to you as provided for by the said Article 12.

As a basis for such an appeal and assuming that the seven reasons given in your letter of October 21, 1936, are before this office in the form of a protest, the following are the decisions of the contracting officer with respect thereto:

(1) The use of gasoline trucks instead of mine cars does not constitute a change in operations for the reason that the mine cars and track as furnished by you were unsuitable equipment, and it became necessary to replace them with suitable equipment in accordance with the terms of the specifications. This was done with your consent.

(2) The use of suitable bumpers on the rear of the trucks obviated the possibility of damage to the tunnel shovels. There has never been any evidence of damage to the tunnel shovels from this source.

(3) Careful supervision of the operation of trucks and tractors eliminated any sources of damage to the tracks or rails from this source.

(4) The danger from gasoline fumes has been overcome from the first by the installation of ventilating fans in the galleries.

(5) All penalties have been computed in accordance with the terms of the contract. The records of this office showing in detail the facts upon which these have been computed have always been open to your inspection and have been explained to your satisfaction repeatedly.

(6) Only two lots of machines are being operated at any one time on the contract. The third lot was furnished at your own election as a substitute for one of the other two machines.

(7) This office has no knowledge of conditions of operation insisted upon by the Resident Engineer with which you could not comply under the contract.

It is suggested that in submitting an appeal to the above decisions you be more specific with regard to your contentions, in order that a complete recital of the facts may be available to higher authority as a basis for its decision.

47. The statements made by the contracting officer in this letter were not made in good faith under the facts and data known to him. The statements contained in the second and third sentences and in paragraphs numbered 1 to 7, inclusive, were not true, and the statements contained in the first, fourth, fifth, and last sentences of the letter were not proper interpretations of the contract.

Plaintiff did not submit a written appeal to the Secretary of War from the actions of the contracting officer. The contract as written by defendant did not contemplate nor intend that he should be required to do so.

48. On October 24, 1936, the contracting officer again wrote plaintiff as follows:

> Reference is made to paragraph 15 of the specifications of your contract * * * for the rental and operation of tunnel shovels and attendant equipment * * *.
>
> In view of the fact that the operating crews furnished by you under the contract stopped work on October 23d and 24th, 1936, because of your failure to pay their wages, it is the decision of the contracting officer that such neglect constitutes a failure on your part "to co-operate with the Government to secure the highest quality of workmanship and progress on the work."
>
> In accordance with the right reserved in the above-mentioned paragraph of the specifications, the contracting officer has decided to keep the contract in full force, to employ suitable operating crews, and to charge the excess cost thereof to the contractor.

There had been no failure on the part of plaintiff or his employees to cooperate with the Government in any way required of them under the contract. The above interpretation of the contract by the contracting officer was wholly unauthorized.

49. Plaintiff's employees on the job, with plaintiff's funds and $12,705.16 supplied by plaintiff's bondsman on demand of defendant, paid the cost of wages and maintenance of equipment to and including October 15, 1936. After that date defendant continued all operations as before under purported authority of the contract, paid the wages of all personnel, maintained the equipment, and charged all such costs, including penalties for delay in operating time of the

two 30 hp. shovels, against the amount otherwise determined to be due plaintiff on the basis of $13.10 an hour for all three shovels, to the conclusion of mucking operations on January 7, 1937, on which date the entire work was completed.

50. For the period of operation from August 15 to October 1, 1936, plaintiff was offered and accepted three payments by defendant in the amounts of $2,839.41, $2,344.64, and $2,634.65, totaling $7,818.70. On October 16, 1936, defendant offered a voucher and payment in the amount of $2,252.87 for the period October 1 to 15, 1936. Plaintiff refused to accept payment under this voucher, and refused to accept any further payment or payments under the contract on the basis on which defendant had compelled the contract work to be carried on, and the basis on which the defendant computed the amount it determined to be due under the contract, as interpreted by the contracting officer. During the period from October 15, 1936, to January 7, 1937, inclusive, defendant computed the rental payment due under the contract for the two 30 hp. and the one 60 hp. Conway shovels in the total sum of $15,341.19 on the basis of $13.10 an hour for the group, which amount, together with the above referred to retained percentage of $1,117.96, totals $16,459.15. Defendant, however, deducted from this amount the cost of providing operating crews for the three shovels and penalties for delay of the two 30 hp. shovels during this period in the total sum of $10,993.15, and also the cost of repair parts furnished by the Government in the sum of $4,539.83. These deductions total $15,532.98. The repair parts costing $4,539.83, as above stated, as well as many other repair parts the cost of which is not shown, which plaintiff was compelled to furnish, were made necessary by the breach of the contract by defendant. In accordance with the final voucher prepared by the contracting officer, this deduction of $15,532.98 left a net balance due plaintiff of $926.17 for the period October 15, 1936, to January 7, 1937, inclusive, or a total balance still due plaintiff under the contract on defendant's basis of computation of $3,179.04, including the amount refused by plaintiff on the October 15th voucher in the sum of $2,252.87.

51. The total material excavated in the completion of the 130 galleries and one tunnel covered by the contract amounted to 121,040 cubic yards. The entire excavating operation was finished in 4 calendar months and 23 days, or about a month and a half less than the time which the contracting officer estimated and allotted when the specifications were written for the removal of only 65,000 cubic yards. Expressed on an hourly basis, the entire mucking operation in removing 121,040 cubic yards was completed in 2,300 working hours as compared to the total time originally estimated by the contracting officer of 3,600 working hours for the removal of only 65,000 cubic yards, a difference of 1,300 hours.

52. In defendant's recapitulation data of the two 30 hp. Conway shovels for the period August 15, 1936, to January 7, 1937, it is shown that Shovel No. 1 had a total running rental time of 2,192 hours and 30 minutes and Shovel No. 2 a total running rental time of 2,273 hours and 56 minutes, a total of 4,466 hours and 26 minutes rental time for the two shovels. During actual operation of these two shovels in removal of blasted material at a face, Shovel No. 1 excavated and loaded at a rate of 28.6 cubic yards an hour and Shovel No. 2 excavated and loaded at a rate of 25.7 cubic yards an hour. The rate of production of blasted material at the mouth of the tunnels during the period August 15, 1936, to January 7, 1937, for the three shovels averaged 27.1 cubic yards per rental hour. Rental time included all operating time for 21 hours a day, except time lost for which the contractor was responsible on account of repairs, replacing parts, greasing, and breakdowns.

53. When preparing the specifications defendant estimated a possible maximum production rate of about 18 cubic yards an hour under the terms and conditions of the specifications, and the working or operating conditions on the project. This estimate is shown by the figures set forth in paragraphs 2 and 3 of the specifications. This estimate was excessive under the terms and conditions of the contract and under the operating conditions to be encountered on the work. The officer who drafted the specifications had had no experience whatever in tunneling operations or in the operation of equip-

ment such as specified and called for in the specifications. In making his estimate and bid plaintiff knew that each of the 30 hp. tunnel shovels was capable, while in actual operation at a face, of loading into mine cars at a rate of more than 20 cubic yards an hour, but in view of the working conditions which would be encountered and with which, from his examination and from his knowledge and experience, he was familiar, and in view of the hand tramming of the mine cars called for, he estimated that each of the 30 hp. shovels would have a production rate at the tunnel mouth of about 7 cubic yards per rental hour, or a total production rate of about 14 cubic yards per rental hour for the two shovels and all equipment operating at full capacity. This estimate was entirely reasonable and proper. Plaintiff computed his bid of $13.10 an hour for two shovels accordingly.

54. On the basis of a production rate of 18 cubic yards per rental hour, 21 hours a day, and 25 days a month, almost 13 months would have been required for removal of 121,040 cubic yards. On the basis of a production rate of 14 cubic yards an hour, 21 hours a day, and 25 days a month, about 16½ months would have been required to complete removal of 121,040 cubic yards.

55. All the equipment furnished by plaintiff conformed to and met all the terms and requirements of the contract, and was suitable and adequate for the purposes for which the contract intended and contemplated that it would be used. If defendant had not breached the contract but had fulfilled its obligations thereunder and if plaintiff had been permitted to perform the work of excavating the 121,040 cubic yards actually removed, with the equipment called for by and in accordance with the terms and conditions of the contract, the amount due him under the contract at the hourly rental rate specified therein would have been about $113,000. Had plaintiff been permitted to perform the contract in accordance with its terms, he would have earned and received a substantial profit, but what the amount of that profit would have been cannot be fairly and reasonably determined from the evidence.

56. The reasonable and actual fair market value of each of the 30 hp. rebuilt Conway shovels used on this job, together with the extra parts furnished therewith when

brought to the job, was $6,500 crated f. o. b. Los Angeles, Cal., in July 1936. The reasonable and actual fair market value of the 60 hp. rebuilt Conway shovel, together with the extra parts furnished therewith when brought to the job, was $8,750 crated f. o. b. Los Angeles, Cal., in July 1936.

57. The total actual fair market value of the three shovels was $21,750 f. o. b. Los Angeles. As of this same date, the cost of a new 20 hp. Conway shovel was $8,600, f. o. b. Los Angeles, and the cost of a new 60 hp. Conway shovel was $10,840, f. o. b. Los Angeles. At this time these machines were in great demand and no new machines were available in the western part of the United States, a fact which is reflected in the market value of the rebuilt machines. There was not sufficient time available for the manufacture of new machines for use on this job.

58. The ordinary useful life with minor repairs of a Conway shovel is 20 years or more. Depreciation through ordinary wear and tear is not in excess of 10 percent per annum. These machines had been acquired and rebuilt in Los Angeles by Douglas C. Corner as a personal project. Mr. Corner had been connected with the Conway shovel business for approximately 20 years, had acquired manufacturing and sales rights to the Conway shovels, and had a controlling interest in the St. Louis Power & Shovel Company, which company manufactured the Conway shovels. He had in his own possession a large number of extra new parts and was in position to acquire shovels and extra spare parts at a minimum cost. Under the circumstances mentioned, the combined cost to Mr. Corner of the three Conway shovels, together with parts and labor furnished at Los Angeles, amounted to $9,018.27, which, together with personally owned parts and material furnished by him in the sum of $7,001.61, represents a total cost of the three shovels to Mr. Corner of $16,019.88.

59. In 1936, 30 hp. Conway shovels had a reasonable bare shovel rental value when used on the Mainland under favorable conditions of at least $400 a month each when operated in the conventional manner with synchronized mine cars.

In 1936, a 60 hp. Conway shovel had a reasonable bare shovel rental value when used on the Mainland under favor-

able conditions of at least $500 when used in the conventional manner with synchronized mine cars.

60. These rental values were not applicable to the machines used on the job under the circumstances and the contract in suit. The contract rental rate for each of the 30 hp. shovels used on this job was $3,437.50 a month.

At the conclusion of the job on January 7, 1937, the total junk value of the two 30 hp. machines was $196 and the junk value of the 60 hp. machine was $119, and the amount of depreciation of the three machines through ordinary wear and tear on this job was $103.75—a total of $418.75. The actual damage to the three machines resulting from defendant's breach of the contract was $21,331.25.

61. Plaintiff's pay roll on the job until he abandoned further work under the contract as audited and itemized by defendant was $15,475.21. Plaintiff's cost to the same date for material and parts, as audited by defendant, was $11,-085.03. Plaintiff's insurance costs included a performance bond premium of $353.70, together with workmen's compensation insurance of $44, or a total of $397.70.

62. All the labor, services, materials, and equipment furnished by plaintiff on the work were necessary and reasonable. The items are summarized as follows:

Damage to shovels	$21, 331. 25
Pay roll	15, 457. 21
Material costs	11, 085. 03
Insurance	397. 70
Total	48, 271. 19

63. The usual and customary percentage of profit allowed on cost-plus contracts in the Territory of Hawaii in 1936 and 1937 was 15 percent. Fifteen percent computed upon and added to the above-mentioned amount of $48,271.19 gives a total of $55,511.87. The deduction of $7,818.70, paid to and received by plaintiff from defendant under the contract, from $55,511.87 leaves $47,693.17.

64. The proof estabishes that as a direct result of defendant's breaches, plaintiff sustained actual damages (including the amount still due him under the contract) of $47,852.85 under the contract as it was performed by plaintiff and by

defendant with plaintiff's employees and equipment and at plaintiff's expense as a charge against the rental determined by defendant to be due plaintiff under the contract to the date of completion. These damages are itemized as follows:

1. Penalty improperly charged and deducted for a total of 417 hours and 32 minutes' delay (finding 31)	$2,755.87
2. Unpaid rental due at $6.55 an hour for each shovel, but deducted for 417 hours and 32 minutes' delay caused chiefly by defendant (finding 32)	2,755.87
3. Extra 30-pound rail not necessary (finding 33)	3,160.59
4. Extra spare parts made necessary by defendant's breach (finding 50)	4,539.83
5. Reasonable rental value of the 60 hp. shovel (finding 44)	10,130.40
6. Damage to the three (3) shovels (finding 60)	21,331.25
7. Balance still due under the contract (finding 50)	3,179.04
Total	47,852.85

65. There has been no assignment nor transfer of plaintiff's claim, or any part thereof, except as the United States Fidelity and Guaranty Company became subrogated in the sum of $12,705.16 which it paid for wages and material.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

June 27, 1936, the defendant, acting by and through the United States Engineer Corps, U. S. Army, War Department, issued through certain officers at Honolulu, T. H., an invitation for bids accompanied by a standard printed contract form and detailed specifications prepared by defendant for the rental of tunnel shovels, to be operated by the contractor, and mine cars of a specified capacity, to be operated or trammed by defendant, together with associated equipment, such as tracks, etc., for use in connection with the project outlined in finding 1.

Plaintiff, James Garfield Needles, submitted a bid for rental on an hourly basis of two 30 hp. standard tunnel shovels, mine cars for hauling the excavated material out of the tunnels, and all other necessary equipment. Plaintiff prepared and submitted to the contracting officer through his authorized representative, who wrote the specifications, a

blue print of a drawing showing the design and size of the mine cars to be made and furnished, and this drawing was examined, approved, and retained by the Government. Thereafter plaintiff constructed the mine cars in accordance with this drawing. Plaintiff was the only bidder, and his bid for rental of this equipment at an hourly rate of $13.10 was accepted. He was notified by the contracting officer of such acceptance on July 17, 1936, and this notice was received by plaintiff on July 21.

The bid form furnished by defendant required plaintiff to state the number of calendar days after date of receipt of notice of award of the contract within which he would be "ready to operate at full capacity under the provisions of the attached specifications," and plaintiff stated in his bid that he would be operating at full capacity within 32 calendar days after receipt of notice of award. The defendant's notice of award and Article 1 of the contract fixed the period of 32 calendar days after July 21, 1936, within which plaintiff should have the equipment operating at full capacity, as contemplated by the specifications. Under the contract plaintiff was entitled, with the consent of defendant, to commence operations at any time after July 21, 1936, the date of the contract and date of receipt of notice, but plaintiff had until August 22, 1936, within which to get the shovels and associated equipment, such as mine cars, tracks, turntables, etc., operating at full capacity. He commenced operations with the consent of the contracting officer on August 15, 1936.

The evidence in this case shows without contradiction that it is recognized and understood by everyone that in a project of the character here involved it takes several days from the time operations are first commenced to get all the equipment and the organization engaged in operating and handling it in smooth working order and operating at normal and full capacity.

A few days prior to Saturday, August 15, 1936, the defendant had blasted certain material at the portal of a certain gallery or tunnel, and on Friday, August 14, with the consent of the Government, plaintiff arranged to commence operating one of the tunnel shovels and the mine cars for receiving and

hauling away the excavated material on Saturday, August 15, at 3 p. m. At that time the second tunnel shovel, or mucking machine, had not been completely assembled, and the operation of the second shovel was to commence on Monday morning, August 17. As shown in the findings and by the provisions of the contract quoted therein plaintiff was to furnish the equipment described and the operators for the shovels, and defendant was to do all the work of drilling and blasting, and the handling, tramming, and dumping of the mine cars as loaded by the shovels.

Sometime before 8 a. m., August 15, plaintiff instructed his men that operations with one of the shovels would commence that afternoon at three o'clock, whereupon he went to Honolulu, a distance of about three or four miles, on business. While plaintiff was absent defendant's contracting officer came to the site of the work about 8 a. m. and remained there not more than half an hour. During the time he was there the tunnel shovel was not operated, but some mine cars were being loaded with blasted material by hand apparently in a sort of cleaning-up process preparatory to commencing operations with the shovel as had theretofore been planned. During the half-hour the contracting officer was there he observed defendant's laborers tram and dump one mine car. It is apparent from the record that during the time the contracting officer was at the site the men on the job did not consider that operations were actually underway. Plaintiff's superintendent, a man of long experience in tunneling operations and in the operation of tunnel shovels and mine cars of the character to be used on this project as called for by the contract, was present while the contracting officer was at the site of the work, but the defendant's Superintendent, who was to have charge of operations for the Government, was not present. The contracting officer states in his testimony that when this loaded mine car was trammed, dumped, and brought back while he was present the men furnished by defendant for the handling and dumping of mine cars spent nearly fifteen minutes in the operation and that, while he did not go to the point where the car was being dumped, they seemed to him to be having some trouble dumping it, but that he did not examine the car, the dumping arrangement

thereon, or the tipple, or inquire of the men as to the trouble they were having, if any, or why it should have taken them several minutes to dump and return the car. Whatever time may have been consumed by defendant's employees in tramming, dumping, and returning the first loaded mine car was due, as the evidence shows, entirely to the inexperience or slowness of defendant's men and was not due to any mechanical defect or inefficiency of equipment. Operations were not then under way and the men were familiarizing themselves with the handling of the mine cars, the operation of the dumping arrangement thereon, and the tipple. The evidence shows conclusively that due to their lack of experience it was necessary to proper handling of the cars that they become familiar with these matters. At this point the contracting officer left the site of the work and did not at any time return thereto until long after the use of mine cars had been abandoned, as hereinafter set forth. Soon thereafter the defendant's superintendent arrived.

The contracting officer, a Lieutenant Colonel in the Engineer Corps, U. S. Army, had had no experience in tunneling operations or in the operation and handling of equipment, including mine cars, such as called for by the contract and furnished by plaintiff. Defendant's superintendent, a civilian, was also without previous experience in the operation of tunnel shovels or in tramming and dumping of mine cars in tunneling operations. Soon after defendant's superintendent arrived he started operations with one of the tunnel shovels and mine cars. Plaintiff's superintendent advised plaintiff at Honolulu by telephone that operations had commenced, and plaintiff returned to the site of the work as soon as he could and arrived there at about 10 a. m.

The evidence of record establishes that all the equipment furnished by plaintiff, including the mine cars, tracks, and tipple, fully conformed to and met all the requirements of the contract and specifications, and was fully capable of operating in accordance with and as contemplated by the specifications as written. When the shovel first started operating on the morning of August 15, 1936, as above stated, it was necessary by reason of the track arrangement and layout at the particular point where operations were com-

menced for the shovel and the mine car attached thereto to operate on a slight curve of the track, but this did not affect the proper operation of the shovel and the mine car under the terms of the contract, and, at most, the condition under which the shovel then operated was only temporary. Plaintiff was not required under contract to operate at full capacity until August 22, 1936. He, therefore, had seven days within which to meet and overcome any preliminary or temporary defects that might be encountered in operation of the equipment. The contract provided for liquidated damages of $200 a day if he did not do so.

The mine cars were of a conventional type and design and in every way conformed to the requirements of the specifications. There is no convincing proof by defendant that the mine cars would have operated better if they had been differently designed and constructed. The mine cars were capable of being easily and speedily trammed from the point of operations to the dumping point and return. They were equipped with a proper, suitable, and easily-workable arrangement or device for permitting one end of the car to be opened and the blasted material loaded in the car to be emptied therefrom at the dumping point, and plaintiff had provided a conventional and suitable dumping arrangement, or tipple, which was strong, practical, workable, and easily operated. The tipple, when operated, inclined not more than 60 degrees, which permitted the mine car to empty its contents and, when the car was so emptied, the tipple automatically returned to normal position. The mine cars each had a capacity of 1½₀ cubic yards; they were constructed of strong material, and it is admitted by defendant's witnesses that the capacity of the mine cars and the material of which they were constructed conformed to the requirements of the specifications. The wheels of the mine cars were 18 or 20 inches in diameter and the body rested on the car axles. The body of the car was at least 2 feet deep, 3 feet 7 inches wide at the top, and 4 feet long. The weight of the car when loaded with the material to be excavated was approximately 800 pounds. A loaded car was capable of being easily and speedily trammed and dumped by one man. The conveyor belt of the tun-

nel shovel, which operated to carry the excavated material from the shovel or dipper in front of the machine to the rear, was about 22 inches wide.

Prior to the time operations were commenced on August 15 plaintiff had demonstrated and tested the tramming and dumping of loaded mine cars many times. These tests show conclusively that the emptying arrangement of the mine cars, when released by the pulling of a latch pin or bar after the loaded car reached the tipple, and the dumping arrangement at the end of the track worked efficiently, speedily, and properly. The far greater weight of credible evidence of record shows to our entire satisfaction that during the short time the equipment was operated on the morning of August 15 all the equipment and facilities mechanically operated properly and in full compliance with the provisions and requirements of the contract. Several mine cars were loaded by hand in the beginning and some were loaded by the tunnel shovel. However, the proof shows, and this is admitted by defendant's witnesses, that the Government laborers whose duty it was to tram and dump the cars handled only two; that they were wholly inexperienced in such work and that they had not prior to the morning of August 15 made any effort to familiarize themselves with the handling, tramming, and dumping of the mine cars. The proof also shows that they were not given that opportunity by the Government when operations were commenced. Under the terms of the contract defendant agreed to handle, tram, and dump the mine cars with labor furnished by it. Defendant had five or six laborers to handle the mine cars. The proof further shows that in the handling of each of these cars four or five men took hold of and rushed it to the dumping point. Defendant's superintendent testified that when he arrived at the site of the work he observed the handling by the men employed by defendant of only one mine car to the dump and return. He stated that as he recollected these men consumed about 10 or 15 minutes in tramming, dumping, and returning the car. He did not at any time examine the emptying arrangement of the car, or the tipple, nor did he at any time make any inquiry of the men or go to the dumping point

to ascertain why it took the men a longer time than he thought should be necessary for dumping and returning the car. Neither the contracting officer nor his authorized representative who later came on the job gave any consideration to or made any investigation as to whether the defendant's force of men was properly or efficiently handling the mine cars. Plaintiff's proof leaves no doubt that the equipment and facilities furnished by him worked properly and met all requirements of the specifications, and there is no credible evidence to the contrary.

Defendant's superintendent testified, as hereinafter more fully set forth, that he knew that the mine car crew was inexperienced and that this was the principal reason why they consumed so much time in tramming, dumping, and returning the mine car which he saw them handling; that when he observed the handling of this car he stopped the work in order to consider the situation and to arrive at a conclusion as to what should be done to overcome the situation resulting from the slowness of the mine car method and the slowness with which the defendant's force handled the mine cars to the end that the work might be speeded up. He states that he did this for the reason, as it occurred to him, that the use of mine cars would have required in hand-tramming the amount of yardage necessary to be removed in construction of the tunnels called for by the contract a great deal more time than was available under the contract to excavate the tunnels and complĕte the job. He states that he discussed the matter with his foreman and came to the conclusion that the mine cars should be abandoned and that automobile steel dump trucks of 2 or 3 cubic-yards' capacity should be substituted therefor and used in place of the mine cars, such trucks to be operated backward and forward, with the movement of the excavating shovels, and under the rear end of the shovel conveyor belt to receive and haul away the excavated material. Thereupon he ordered that the mine cars be discarded, that trucks be substituted, and that the work proceed from that time forward by the use of trucks, instead of mine cars. As set forth in the findings, these trucks severely collided with and seriously damaged the shovels and their operating

parts and mechanism to such an extent that at the end of the work the shovels were valueless, except for junk. This damage to the shovels also resulted in great expense to plaintiff for repairs and for additional parts. These trucks also operated over or across the tracks necessary for the operation and movement of the tunnel shovels, and defendant also operated caterpillar tractors and bulldozers over and upon the tracks which also damaged the tracks, and this was primarily, if not wholly, responsible for delay in actual mucking operations, including the delay due to breakdowns and repairs, for 417 hours and 32 minutes, for which time plaintiff was not paid rental and for which he was penalized in addition. The lost rental and penalties amounted to $5,511.74, which was deducted by defendant from the amount of rental which would otherwise have been due under the contract.

All the actions taken by defendant's superintendent, as hereinbefore set forth, and the reasons for which he took such actions were known to the contracting officer's authorized representative in charge of the work and to the contracting officer personally, and such actions were all approved by them over plaintiff's protests for the same reasons that prompted defendant's superintendent to take the action mentioned. The actions and decisions of the contracting officer were unjustified and unauthorized on the facts which were known to him and the terms and conditions of the contract, and constituted a breach of the contract. His decisions were adhered to in disregard of the true facts and the rights of plaintiff under the contract, notwithstanding vigorous protest by plaintiff when he arrived on the job and continuously thereafter until he abandoned the work early in October, as hereinafter set forth. The proof shows that these actions and decisions of the contracting officer were arbitrary and were not made in good faith. The proof further shows that upon the facts which existed, which were known by and available to the contracting officer and which should have been considered and given weight by him, the decisions made were under the terms of the contract so grossly erroneous as to imply bad faith.

Plaintiff arrived at the site of the work a short time after

defendant's superintendent had started operations and had ordered that the use of mine cars be discontinued and that trucks be substituted therefor. He immediately observed that the mine cars were not being used; that, instead, large trucks were being used; that there were several loaded mine cars standing on the track; and that a truck being operated with the shovels was standing at an angle under the rear of the tunnel-shovel conveyor and had torn the conveyor belt for about eight feet. Plaintiff immediately called his men off the job and ordered all operations stopped. He vigorously protested to defendant's superintendent, advising him in effect that the use of trucks was a violation and a destruction of the contract; that the Government had no right to discard the mine cars; that the mine cars conformed in every way to the requirements of the contract and that he could not carry on operations in accordance with the contract if trucks were used in lieu of mine cars; that substitution of trucks constituted a breach of the contract, and that the use of trucks would damage his shovels because they were not designed nor intended to be operated with trucks but were especially designed and constructed to be operated only with the particular mine cars provided and called for under the contract; and that the rental arrangement provided for in the contract could not be applicable to the operation of shovels with the trucks. Plaintiff later made the same protest to the contracting officer, without avail. When plaintiff arrived at the site he asked defendant's superintendent what the trouble was and why he had discarded the mine cars. The superintendent told plaintiff that the mine cars didn't work because they were too slow, and that the men, whose duty it was to handle them, consumed too much time in tramming and dumping the mine cars. In reply to this statement plaintiff stated to the superintendent that the mine cars conformed to the contract and that he would demonstrate that the mine cars did work properly and that they could be easily and speedily trammed and dumped. Thereupon plaintiff, although he was a man 65 years of age and suffered from heart disease, took hold of one of the loaded mine cars standing on the track nearby and, without assistance, trammed it to the turntable, revolved the turntable, trammed the car to the dumping point on to

the tipple, released the end gate of the car, tilted the tipple, emptied the car and returned it to the point of origin without any difficulty whatsoever and in a very short time. In this operation the track, the mine car, and the tipple worked perfectly. When plaintiff had returned the empty car he stated to the superintendent that there was nothing wrong with the cars or the dumping arrangement thereof, or with the tipple, and that all that was necessary in handling, tramming and dumping of mine cars was to handle them normally and with a little discretion. He further told the superintendent that everyone on the job, except the operators of the tunnel shovels, was new and inexperienced, and that all that was necessary was for the Government laborers handling, tramming, and dumping the mine cars to be shown or instructed how to handle and dump them. At this point Captain Hill, the authorized representative of the contracting officer, arrived. Captain Hill had been specifically authorized by the contracting officer to have complete charge for him of the work and the operation of the equipment, and to act for him in all matters with respect thereto, except the matter of making final decisions, which he, the contracting officer, was required under the contract to make. Plaintiff stated to Captain Hill that the mine cars worked perfectly and that the Government did not have the right under the contract to use the trucks in place of mine cars and that he, the plaintiff, would not stand for this. Thereupon Captain Hill threatened to incarcerate plaintiff in the guard house on the military reservation if he interfered with continuance of the work with the trucks—the work at that time being at a standstill—and Captain Hill ordered the men back on the job and ordered that the work proceed with the use of the trucks. Captain Hill did not at that time or at any other time make any objection to the use of the mine cars on the ground that they were mechanically defective or inadequate under the contract for the purposes intended, or that they did not work properly and efficiently when properly handled. His sole objection was that the mine cars were too slow and he stated for that reason the Government was not going to use them. Plaintiff later further protested to Captain Hill about the violation of the contract through use of trucks, insisting that their use should

be discontinued, and pointed out to Captain Hill his rights under the contract. In reply he was told that the Government could do whatever it desired in respect to the use of mine cars and that plaintiff did not have any rights under the contract in that regard. Shortly thereafter plaintiff went to the contracting officer and protested to him, as he had to defendant's superintendent and to Captain Hill. The contracting officer, with full knowledge of the facts in connection with the matter as hereinbefore set forth, approved the actions and decision of his representative and declined to consider or give weight to the true facts and conditions stated by plaintiff in his protest. The contracting officer told plaintiff that he had the right under the contract to do what had been done and that he would not use the one cubic-yard mine cars, but would use the 2 cubic-yard trucks instead because the mine cars were too slow; that the use of trucks was to the advantage of the Government and the work, and that speed was essential as it was necessary that the work be completed at the earliest possible date. From that time forward, until he abandoned the contract early in October by reason of these and further breaches of the contract by defendant, plaintiff continuously protested to the contracting officer with reference to the use of trucks and of the caterpillar tractors and bulldozers in the tunnel. Plaintiff did not at any time acquiesce in or consent to the actions of the contracting officer in using trucks instead of mine cars, or in the use of the caterpillar tractors and bulldozers in connection with tunneling operations.

Thereafter the work continued under orders of the contracting officer, but under the protest of plaintiff, until about October 2d when defendant again breached the contract in another respect by insisting upon the right under the contract to use a third 60 hp. tunnel shovel without compensation or rental to plaintiff therefor. When the matter of the use of a third shovel was first mentioned to plaintiff by the contracting officer, plaintiff objected to use thereof on the work, but the contracting officer asked plaintiff to submit to him a proposal setting forth the terms and conditions under which he would be willing to permit use of the third shovel. Plaintiff submitted a proposal (quoted in finding 36) but the contracting officer refused and rejected

it, and told plaintiff on October 2 to place the third shovel in operation on the work under the contract in addition to the two 30 hp. shovels called for by the contract, and further told plaintiff that he, the contracting officer, had the right under the contract to require this to be done without payment of additional rental. Plaintiff refused to do this and protested to the contracting officer that use of the third shovel would be a violation of the terms of the contract. In reply the contracting officer stated that the third shovel would be placed in operation on the job by the Government and operated with plaintiff's employees and attendant equipment. The contracting officer brought the third shovel on the job between October 2 and 4. Plaintiff became ill and was taken to the hospital on October 5, and on October 7 he wrote the contracting officer notifying him that due to operating conditions, which included the asserted right to use the third shovel, imposed upon him in violation of the terms of the contract, he found it impossible for him to continue to perform the contract. On October 9 the contracting officer replied that the Government would not release plaintiff from performance under the contract.

The 60 hp. shovel with a number of two cubic-yard standard Koppel mine cars had been brought to the site as a protection to plaintiff against unforeseen contingencies or breakdowns and for possible use by defendant, if it desired to operate the same on this or other work under satisfactory arrangements with plaintiff. When the contracting officer had completed arrangements, including the laying of track owned by plaintiff, for operation of the additional 60 hp. shovel he placed it in operation on the job on October 13, without compensation. On October 14, 1936, the contracting officer, after having received plaintiff's letter of October 7 stating his abandonment of the contract, wrote plaintiff a letter in which he stated that "It is hereby decided by the Contracting Officer that the equipment furnished by you under the above-named contract is unsuitable because of a lack of an adequate supply of spare parts to keep said equipment in operating condition." The contracting officer further stated in this letter that it was his decision to keep the contract in full force; to condemn as un-

suitable all parts of said equipment which required replacement in order to perform the work required, and to replace same with suitable parts and charge the extra cost thereof to the contractor as a charge against the rental due under the contract. In reply to this letter plaintiff wrote the contracting officer on October 21 setting forth the grounds on which he had abandoned the contract on October 7, one of which was the decision and order of the contracting officer that the third 60 hp. shovel be placed on the work. In reply to this letter from plaintiff, the contracting officer on October 24 wrote plaintiff the letter set forth in finding 46. The statements made by the contracting officer in the second and third sentences and in paragraphs numbered 1 to 7, inclusive, were not true and the statements made by the contracting officer in the first, fourth, fifth and last sentences of this letter were not proper interpretations of the contract.

Plaintiff's funds, including some supplied by his bonding company while he was in the hospital, were used by plaintiff's employees to pay wages and cost of operations to and including October 15. No further expenditures were made therefor on plaintiff's account. On October 16 plaintiff had refused to accept from the Government any further payment offered on account of the contract for any work in connection therewith after October 1, 1936. The contracting officer elected to continue the contract in full force and to operate the equipment as before, including the third shovel, paid all costs of operation, including repairs, extra parts and wages, and charged same to plaintiff as a deduction from the amount otherwise due him at the rental rate of $13.10 an hour. After the work had been completed on January 7, 1937, by defendant, plaintiff was offered the amount of $926.17, not including the retained percentage, as the balance due under the contract, which plaintiff refused to accept. Plaintiff was still ill in the hospital when defendant took over the work.

Upon the facts set forth in the findings and the foregoing discussion of the evidence, the issues presented are (1) Did the defendant breach the rental contract with plaintiff for the use and operation of tunnel shovels and mine cars for

removal of the blasted material from the galleries or tunnels? (2) Under the language of the contract, which includes the specifications, all of which were written by defendant, was the decision of the contracting officer final with respect to matters concerning which he made decisions, and which are claimed to have constituted breaches of the contract, or was the final decision contemplated by the contract with reference to the matters involved to be made by the head of the department? And was the plaintiff required, as a condition to his right to sue for damages, to appeal the particular actions and decisions made by the contracting officer to the head of the Department? (3) Were the actions taken and the rulings made by the contracting officer consistent with good faith or were they arbitrary or so grossly erroneous as to imply bad faith? (4) Does plaintiff's petition set forth sufficient facts and allegations to entitle him to relief by way of damages for breach of contract? And (5) The measure of damages and the amount thereof.

We are of opinion that upon the facts clearly established by the greater weight of the credible evidence of record, these questions must be decided in favor of plaintiff.

As to the first question there can be no doubt from the evidence that defendant breached the contract. The first breach was the result of the arbitrary and grossly erroneous action of the contracting officer in substituting trucks for the hand-trammed mine cars called for by the contract and the unnecessary and unauthorized use of the caterpillar tractors and bulldozers in tunneling operations. The proof convinces us that in taking this action the contracting officer could not under the facts and relevant data, and the terms of the contract, have reached the conclusion which he did if he had acted in good faith and with due regard to the rights of both parties to the contract. His action was contrary to all the existing facts, conditions, and relevant data known to him and available for his consideration and, also, was contrary to the provisions of the contract.

The second breach occurred on October 2, 1936, when the contracting officer, after rejecting plaintiff's proposal made at his request, told plaintiff to place the third shovel in operation on the work under the contract, notwithstanding

plaintiff's claim that the Government did not have the right under the terms of the contract to use the third shovel without satisfactory arrangement as to adequate compensation therefor. This decision of the contracting officer certainly did not involve any question of fact. It was an unauthorized decision and, therefore, not final. His decision was based upon his interpretation of the contract that the Government had the right to operate the third shovel on the work in addition to the two other shovels without additional compensation. His real reason for taking this action was to enable the Government to complete the work sooner than it could be completed with the two shovels and at less expense.

Plaintiff had the clear right to abandon the contract on account of defendant's breaches thereof, and this the plaintiff did on October 7. The contracting officer's attempt to declare plaintiff in default for failure to cooperate; to declare the equipment unsuitable; to keep the contract in full force and effect; to replace alleged unsuitable parts of the equipment, and to charge all cost of performance and of materials to the contractor was without legal effect as against the rights of plaintiff because the contracting officer did not have the right on the facts and under the terms of the contract to do this without assuming the consequences, by way of damages, of such action.

The next question relates to the finality of the actions or decisions of the contracting officer, or of his representative in charge of the work, which were expressly ratified and approved by him.

We have found as a fact from the evidence of record that the actions and decisions of the contracting officer were not made in good faith, and that upon the existing facts, conditions, relevant data, and the terms and conditions of the contract those actions and decisions were unauthorized, arbitrary, and so grossly erroneous as to imply bad faith. While the testimony submitted by plaintiff and by defendant is conflicting in certain respects, it can be reconciled in certain particulars on the evidence as a whole. In certain other respects the testimony of defendant's witness is not convincing. The far greater weight of credible evidence

of record clearly supports the findings made. Some attempt was made in the testimony of certain of defendant's witnesses, particularly in that of the contracting officer and his authorized representative, Captain Hill, to give some justification for their actions, but this testimony is not convincing, and it is apparent, when all other facts disclosed by the record are considered, that this testimony of these witnesses does not support the action taken and is not entitled to be given weight. The testimony submitted by defendant fails to show that the contracting officer acted in good faith in the actions which he approved or which he took. The far greater weight of credible evidence clearly supports plaintiff's claim that the equipment furnished under the contract met all the requirements thereof; that it was sufficient, adequate, and suitable to perform the work at a rate of production which was possible under the terms of the contract and the conditions existing in connection with the work; that the equipment and associated facilities operated properly and efficiently, and that there were no mechanical defects therein. The contracting officer and his authorized representative, whose actions he approved, seemed to take the position in their testimony that although the mine cars met the requirements of the contract as to capacity and were not mechanically defective they were not satisfactory to the contracting officer because they were "too slow" and that, for this reason, he had the right under his interpretation of paragraphs 10 (b), 14, and 15 of the specifications to discard them and to substitute the use of trucks therefor having a capacity of twice that of the mine cars in order to speed up the work. However, as hereinafter stated, plaintiff had not agreed to complete the work within any stated period of time. He had made no stipulation as to how long it would take defendant's force to tram and dump a car, and he had not agreed as to any particular rate of production. He stipulated only that he would furnish a sufficient number of cars so that there would not be more than a one-minute delay in changing the cars. He did this. Paragraph 10 (b) of the specifications specified that the mine cars to be furnished should be of a capacity of between 1 and 1½ cubic yards each; and it further specified that

these cars were to be hand-trammed by labor furnished by the Government. This paragraph concluded with the provision that "Cars shall be fitted with suitable roller-type wheel bearings, or equal non-friction type, and shall be capable of dumping in a manner satisfactory to the contracting officer." The cars were clearly capable of dumping in a satisfactory manner and the contracting officer did not make any finding to the contrary. It seems clear to us that under this provision of the contract, when considered in the light of other provisions thereof, the contracting officer was not entitled arbitrarily or capriciously to declare that the mine cars did not dump in a satisfactory manner. *Saalfield* v. *United States*, 246 U. S. 610, 613. The contracting officer did not find, or attempt to find, that the mine cars were not capable of dumping in a satisfactory manner under the provisions of the contract because he never made any investigation or inquiry into the dumping arrangement of the cars or of the tipple, or the actual manner in which they operated when dumping. The true facts, which conclusively established the contrary, were supplied by plaintiff by a demonstration at the time and in his protests, but the contracting officer refused to consider such facts or to give weight thereto. What he did, as is shown by his testimony, was to discard the use of mine cars mainly because the inexperienced Government laborers consumed too much time in tramming and dumping the two mine cars which they handled on the morning of the 15th, and partly because of their size and inherent slowness. In other words, the basis of his action was his interpretation of the contract to the effect that it gave him the right to do whatever he deemed necessary, notwithstanding the additional cost to plaintiff, to speed up the work. But it seems clear that he was limited in this by the terms of the contract. *Chicago and Northwestern Ry. Co.* v. *United States*, 104 U. S. 681, 685.

The proof shows that the contracting officer did not at any time state to plaintiff that the cars were not capable of dumping in a satisfactory manner but stated only that operations, by their use, were too slow and that too much time was consumed by laborers handling the mine cars to permit the work to be completed within the seven-months'

time which had been estimated by defendant for removal of 65,000 cubic yards. Since the Government assumed the obligation of handling and tramming the mine cars, plaintiff was not responsible for the slowness with which his laborers handled them. Paragraph 10 (b) (3) of the specifications expressly so provided. Neither was plaintiff responsible for the inherent slowness of the mine-car method of operations. What the contracting officer actually did was to double the capacity of the equipment called for by the contract at the expense of the contractor.

Paragraphs 2, 3, and 4 of the specifications, quoted in finding 4, after setting forth that the duration of the work was dependent upon conditions not directly connected with operation of the equipment called for by the contract and could not be guaranteed, stated certain figures as to defendant's estimate, from which it appears that defendant estimated a rate of production with the mine cars of about 18 cubic yards an hour. This rate of production would probably have been about normal for mine cars of 1½ cubic yards each. But the contract permitted mine cars of the capacity furnished. Plaintiff did not stipulate nor agree in the contract that the equipment called for by the contract and specifications would under the operating conditions existing and to be encountered produce 18 cubic yards an hour for 21 hours a day and 25 days a month. Even if he had so agreed the work of excavating the 130 galleries and one tunnel could not have been completed in seven months. The proof establishes without contradiction that the contract terms were such as to disclose to anyone experienced in tunneling operations that with the equipment called for, particularly the hand-tramming of mine cars of about one cubic-yard capacity to be operated in the manner specified and under the conditions to be encountered, the production rate possible under the contract in such conditions would be about 14 cubic yards an hour. The proof shows, also, that plaintiff so estimated the work and computed his bid of $13.10 an hour accordingly. The proof further shows that this interpretation of the specifications and the estimate of the rate of production possible thereunder were entirely reasonable and proper. Plaintiff agreed merely to rent

equipment meeting the requirements of the specifications, including two shovels each capable of excavating and loading at a rate of not less than 20 cubic yards an hour while *actually operating at the face*, and mine cars meeting the requirements of the specifications, and to operate the shovels at a specified rental for seven months, or until June 30, 1937, at the election of defendant. The proof shows and defendant's witnesses admit that the two 30 hp. shovels called for by the contract were capable of loading more than 20 cubic yards an hour while in actual operation at a face. They actually excavated and loaded at the rate of from 26 to 28 cubic yards an hour. There was no requirement in the contract that plaintiff produce at the mouth of a tunnel any particular number of cubic yards an hour, or day, and it is not claimed by defendant that there was any such requirement in the contract. The rate of production at the mouth of a tunnel was dependent to a very large extent, in fact almost entirely, upon the way in which the mine cars were handled. All that plaintiff was required to do was to operate the equipment called for by the contract at its full capacity, and the proof shows that he was prepared and able to do this. The proof further shows that had plaintiff been permitted to do this he would have had a production rate of at least 14 cubic yards an hour, provided defendant's force properly and efficiently handled the mine cars.

Plaintiff was not responsible for delay resulting from the handling of the mine cars under paragraph 10 (b) of the specifications, which provided "That cars shall be trammed by hand by labor furnished by the government; * * * and that a sufficient number of cars shall be furnished to insure that no delay of more than one (1) minute shall occur in the operation of the tunnel shovel as a result of the unavailability of empty cars, provided that such unavailability is due to causes beyond the contractor's control."

The defendant's superintendent in charge of the work, who was the one who made the original arbitrary decision that the mine cars should be abandoned because they were too slow and that trucks be used instead, which decision was soon thereafter approved by the contracting officer, was asked

"What was the difficulty with the dumping?" His testimony was as follows:

A. Well, principally our men were not trained in the dumping of mine cars and we hadn't made any trial dumps with them before, so we had to examine the dumping arrangements which, on this particular car, was a front-end dump.

* * * * *

Q. Well, after your observation of the difficulty that the men were having with the mine car, what happened? What did you do?
A. We used a truck, a two-yard dump truck, under the Conway [shovel].
Q. What prompted you to abandon the use of the mine cars, or did you make that decision?
A. The decision itself—I don't remember how we arrived at the decision to use the trucks. It was done simply by putting the truck under there. Whether it was first suggested by one of the foremen, or even possibly one of the workers, I don't recall. I do know that we ran a truck in under there and loaded it.
Q. Did you make any attempt to estimate how long it would take to complete the contract by the use of mine cars?
A. No, except that it would be impossible to have hand-trammed the quantity of muck that we had in the time allowed for the job. * * *.
Q. You referred to the use of only one mine car. Was that all that was used? That is, at the very first, or how many attempts did you make to use the mine car?
A. I recall just the one attempt.
Q. Just one car?
A. Yes.

As hereinbefore stated, when plaintiff arrived at the site of the work, soon after the above-mentioned occurrence, he demonstrated in the presence of defendant's superintendent and all others present the use of the mine cars by, himself, tramming and dumping a loaded mine car and returning it to the point of operation, a total distance of about three hundred feet, in a very short time and without any difficulty whatsoever. The defendant's superintendent, however, testified that he did not recollect seeing this demonstration of the tramming and dumping of this mine car by plaintiff, but the

proof is conclusive that the demonstration was given in his presence and immediately following plaintiff's statement to the superintendent that he would demonstrate with a loaded mine car how easily and efficiently it could be operated. We think defendant's superintendent did see the demonstration. If he did not it was because he deliberately refused to look. Clearly the contracting officer had no right under the contract to deny plaintiff the right to use the mine cars and put him to great expense merely because the laborers furnished by the Government did not properly perform their duty or did not work fast enough to suit him, or because the one-cubic-yard mine cars were inherently slow even when properly handled.

The proof shows that neither the defendant's superintendent nor the contracting officer gave the Government laborers on the work of tramming and dumping the cars the opportunity to become familiar with the handling thereof although the contract expressly allowed for this and plaintiff insisted that such opportunity should be afforded. Government witnesses admit that lack of experience of Government employees was primarily responsible for the action taken. The contracting officer admits in his testimony that the basic reason for his action with reference to the mine cars was that they were too slow. If the Government had allowed its employees an opportunity to become familiar with the handling of the mine cars, the loaded cars could have been trammed, dumped, and returned by them easily and speedily without any difficulty or delay.

Under the terms of the contract plaintiff had until August 22, a period of eight days, commencing on August 15, within which to have all the equipment which he was required to furnish under the contract operating properly and at full capacity. This contract right was arbitrarily denied plaintiff by the contracting officer. The record shows without dispute that in an organization and with equipment on a project of the character here involved, it takes several days to get the organization and the equipment working and running smoothly and efficiently.

In connection with the finding of gross error and implied bad faith, the question naturally arises as to what is meant

by the term "implied bad faith" in connection with a ruling or decision of a person whose decision is made final under a provision of a contract.

At the outset it should be stated that an officer who is given authority to decide specific matters under a contract or to decide questions of fact, or all disputes arising under a contract, should consider, and is required to consider, and act upon the particular matter or question before him fairly and impartially and "with due regard to the rights of both parties" to the contract. This is made clear beyond doubt by what the court said in its third opinion in the case of *Ripley* v. *United States*, 223 U. S. 695, 701, 702, in which the court said:

> * * *. No matter how long the delay or how great the damage, he [the contractor] was entitled to no relief unless it appeared that the refusal [of the person authorized to decide] was the result of "fraud or of such gross mistake as would imply a fraud." *Martinsburg & P. R. Co.* v. *March*, 113 U. S. 549; *United States* v. *Mueller*, 113 U. S. 153.
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> But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties.

See, also, *Saalfield* v. *United States*, 246 U. S. 610, 613. In the application of this rule to a particular case of a decision made under a contract many things must be considered, as is shown by a study of the three opinions of the Supreme Court in the case of *Ripley* v. *United States*, reported in 220 U. S. 491, 222 U. S. 144, and 223 U. S. 695, for the purpose of reaching a conclusion of ultimate fact as to whether in view of all facts and circumstances disclosed by the record and known by and available to the contracting officer, and which should have been considered by him, he carefully and impartially considered all the facts and circumstances reasonably, candidly, and in an unbiased manner for the purpose and with the desire to reach a fair, just, and intellectually honest decision in accordance with the true intent and meaning of the contract as disclosed by the language and purposes thereof, as well as by the specific provisions concerning the particular matter under consideration.

In cases involving a written contract with the Government the contract, specifications, and drawings are in practically every case wholly prepared and written by the Government through persons authorized to do so. The printed contract form as a separate document contains a provision that such specifications and drawings as are prepared shall constitute a part of the contract. In these documents the Government sets forth rather specifically its rights, liabilities, and obligations, as well as those of the other party thereto, and, since all contract provisions are written by the Government, consideration must always be given in a suit based thereon to the matter of the intention of the Government as indicated by the language of the contract and the extent to which the successful bidder who signs the contract intends to agree when he executes it. See *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538. Contractors who sign and agree to these contracts and specifications are not permitted beforehand to make changes therein or to insert therein provisions for the purpose of setting forth, as a part of the contract, their understanding and intention with reference to the various articles and specification provisions thereof. These matters are to be kept in mind and given such consideration as they merit in light of the evidence presented by the record in a case where the contention is made that the finding or the decision of the person authorized to decide was not made in good faith and was arbitrary, capricious, or so clearly erroneous as to justify the implication of bad faith. When such a contention is made and the issue as to whether the finding or decision involved was or was not consistent with good faith, or that it should be found to have been arbitrary or so grossly erroneous as to imply bad faith, is present, no question of personal animosity or calculated bias, prejudice, or actual dishonesty is necessarily involved in an ultimate finding of implied bad faith. One or more of the elements just mentioned might be present in some cases and, if it is, it should be considered, but that would be in an exceptional case and certainly not one typical of the cases which define the rules and the evidence to be considered and applied in an ultimate finding of fact that the decision should be held incon-

clusive because arbitrary or so grossly erroneous as to justify the implication of bad faith. Good faith, impartiality, or gross error, and implied bad faith are all to be considered by the court in a legal sense—that is, the extent to which, in the light of the facts and data known and available, they are present or absent in connection with the decision made and in connection with the duty and responsibility of the contracting officer under the terms of the contract under which he acts. A decision or finding may be held to be arbitrary when existing important facts, conditions, and express contract provisions should obviously have been considered and given due and proper weight, but were not. A decision may be found to be arbitrary when the facts show that the person given authority to decide took the position that the matter involved was a matter to be disposed of in his discretion when such was obviously not the case and he was required by the contract to consider and weigh facts, circumstances, and conditions, as well as to interpret and be governed by certain standards contained in the terms of the contract. Such actions, under proof sufficient to show that if the contracting officer had properly and reasonably considered the facts and contract provisions he should and probably would have reached a different conclusion, would not be consistent with good faith and would also be grossly erroneous and would justify a finding of implied bad faith, namely, that there was clearly lacking a faithful discharge of the duties and obligations imposed by the terms of the contract, as well as by the position of the officer as a fair and impartial arbiter.

In *Saalfield, etc.* v. *United States, supra*, the contract called for one hundred guns, the manufacture and delivery of which by the contractor depended upon a test gun of each caliber called for meeting certain standards specified under a provision of the contract, which stated that "the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily * * *. Both gun and carriage must endure these tests in all respects satisfactorily, both as to the strength of material and facility of operation." The Supreme Court held at p. 613, citing *Ripley* v. *United States*, 223 U. S. 695, 701, 702, "* * *

that the acceptance of additional guns was dependent on this one 'passing its test satisfactorily,' " and further stated it was apparent from the provisions of the contract that the contract contemplated "that the Chief of Ordnance and his superior officer, the Secretary of War, were to decide, not arbitrarily, but candidly and reasonably, whether the gun had satisfied the required test." The fact of implied bad faith in a legal sense may be inferred from the grossly erroneous nature of the finding or decision of the administrative officer. In addition to proof of gross error, additional evidence of animus against the contractor is not required any more than it would be of defendant in a case in which it seeks to overcome the finality of a decision of its agent upon the ground of gross error and lack of good faith. Neither is personal bias or prejudice necessary to be proved in addition to proof of error so gross as to warrant the court in inferring the fact of bad faith, or the total absence of good faith. A proper interpretation of the decided cases which have discussed the question seems to make rather plain what we have said above. In the concurring opinion of Judge Madden in *Bein* v. *United States*, (No. 44619, *ante*, pages 144, 167), it is pointed out that the court may review an administrative decision when all the substantial evidence and relevant data known to the officer and normally considered in arriving at such a decision are against it. Under such facts the decision would be so grossly erroneous as to justify the inference of bias or bad faith. It is difficult to see just what other type of evidence would be required to sustain a conclusion of fact of the absence of good faith or of implied bad faith. It would not seem necessary to a finding of implied bad faith that the evidence must in every case show that the person authorized to decide willfully or deliberately disregarded the merits of the dispute or question before him in order to decide it against the contractor. The statement frequently made that a finding or a decision honestly arrived at, although erroneous, will not be upset or reviewed by the court would seem to mean no more than that where there has been an honest endeavor to obtain all the facts and relevant data and to candidly and reasonably weigh and consider them in an effort

to arrive at a fair and reasonable decision, such decision will be upheld although the court, upon the facts, is of the opinion that it would have reached a different conclusion or that a different decision should be made upon such facts. See *Martinsburg & Potomac Railroad Company* v. *March*, 114 C. Cls. 549. What has been said above conforms to what was said in the concurring opinion of Judge Whitaker in *Bein* v. *United States*, *supra*, in which it is pointed out that there was no reasonable basis in the contract, or in the evidence, to support the rulings of the officers in question—that no reasonable man candidly and fairly considering all the facts and relevant data could have interpreted the contract documents as they did and that, this being so, the conclusion of fact was reached by the court that these officers did not render their decisions impartially, i. e., in good faith.

Whether there was, when the administrative decision was made, such an absence of impartiality and good faith as to imply bad faith is a conclusion of fact arrived at by the use of an objective standard. The early decisions of the Supreme Court with reference to finality of a decision of an officer are, generally, that such decision may not be upset "except for fraud or failure to exercise an honest judgment, or, unless so grossly erroneous as to imply bad faith." See *Kihlberg* v. *United States*, 97 C. Cls. 398, 402; *United States* v. *Gleason*, 175 U. S. 588, 607. These cases did not discuss what was meant by implied bad faith, but the last-mentioned ground—that a decision would be upset if so grossly erroneous as to imply bad faith—seems to make clear that the court was aware of the difficulties of proving bad faith and intended that it should be understood that bad faith in a legal sense could be inferred from the grossly erroneous character of the decision itself. This conclusion seems to us to be supported by a study of the three opinions of the Supreme Court in the case of *Ripley* v. *United States*, *supra*. In the first opinion of the Supreme Court in that case, reported at 220 U. S. 491, the court stated at page 496 that it was the clear duty of this court, in dealing with the question of good or bad faith, not to leave the subject in doubt, but, "to explicitly find whether or not that which it states was manifest, was or was not known to the inspector and

whether that subordinate official acted in good or bad faith in the various refusals * * *."

It would seem clear from a study of the decisions of the Supreme Court on the subject of good faith or gross error and implied bad faith that they recognize that implied bad faith may be inferred from the grossly erroneous character of the decision itself—that is to say, that implied bad faith is to be inferred when the proof shows that the error is so grossly erroneous that no officer acting in good faith under such a responsibility, and acting reasonably and candidly with due regard to the rights of both parties could fairly, justly, and honestly have reached the decision in question upon a fair, unbiased, and impartial consideration of the facts, circumstances, conditions and the contract terms concerning the matter of the question involved. Erroneous decisions are nearly always erroneous in varying degrees and it is the degree to which a particular decision is erroneous that determines whether, in the light of all the facts and relevant data relating to the gross error, it will be treated as final and conclusive or will be set aside and a proper decision made by the court. The mere fact that a decision is simply erroneous on the facts before the contracting officer making the decision is clearly not enough to upset it. The fact that the decision was very erroneous likewise is not sufficient to justify its being overturned if the officer appears to have known or considered fairly the facts and circumstances, or if there is no proof that he did not do so it will be presumed that he did consider them. Finally, as the court pointed out in the second opinion in *Ripley* v. *United States*, 222 U. S. 144, 147, the decision or finding of the officer may be found by the court to have been grossly erroneous, nevertheless it cannot be upset if under all the facts and circumstances the gross error may still be regarded under all of the evidence as consistent with good faith upon the part of the officer; but such gross error will justify the court in upsetting the decision if the extent of the gross error and the character thereof is shown by proof of facts and circumstances known to or available to the officer to have been inconsistent with good faith—that is, wholly inconsistent with the kind of a decision which a fair-minded person would have reached upon a candid, reasonable, and impartial

consideration of all the known and available relevant facts and data.

As a general rule of approach and consideration of the question of good faith, gross error, and implied bad faith, the court may examine the officer's decision on the question involved and then compare such decision in the light of the evidence and the facts and relevant data known or available to the officer with the kind of decision which should have been made after a full, candid, and impartial review of all such facts and relevant data. If upon the evidence the court believes that the decision although grossly erroneous is nevertheless consistent with good faith and the exercise of a fair and honest judgment, that it is consistent with an effort on the part of the officer to act impartially and to deal fairly and with due regard to the rights of both parties, as the Supreme Court has said he must, then the decision will not be upset. On the other hand the decision will be overturned and disregarded if upon a candid, reasonable, and impartial consideration of all the facts, conditions, and relevant data known or available to the contracting officer, which should have been considered and weighed by him, the court believes that there is too great a gap between the grossly erroneous decision which the officer made and the decision which should or doubtless would have been arrived at if he had in good faith, candidly, and reasonably considered all the facts and relevant data with regard to the rights of both parties. In other words, as Judge Whitaker said in his concurring opinion in *Bien* v. *United States*, *supra*, if the Court is satisfied that no reasonable man could have determined the dispute upon all the relevant facts and data as the administrative officer did, then the court is justified in inferring, as a fact, that the decision was not made impartially or in good faith. If this should not be the process contemplated by the rule that a decision may be set aside if "so grossly erroneous as to imply bad faith," it is difficult to see how the rule could ever be consistently and properly applied within the realm of the probable intention of parties to a contract..

Having found and concluded in this case that the actions of the contracting officer with reference to the use of the mine cars on the work and the use of the third shovel were upon

the facts and under the terms and conditions of the contract arbitrary and so grossly erroneous as to imply bad faith, there is left for consideration the question of whether the decision of the contracting officer was intended to be final or whether plaintiff was required under the contract and specifications to appeal those rulings to the head of the department within thirty days or lose his right to maintain suit for recovery of damages for breach of contract.

Plaintiff did not appeal to the head of the department because he did not consider that he was required to do so under the terms of the contract with reference to the particular decisions of the contracting officer. In this we are of opinion that plaintiff was right for several reasons. After plaintiff had abandoned the work for breaches of the contract, it appears from letters written to plaintiff that the contracting officer endeavored for the first time to impose upon plaintiff the obligation of appealing from his decisions under the provisions of Art. 12 of the printed contract form. But we are convinced from a careful study of the record that this was an afterthought and that neither the contracting officer nor his authorized representative who wrote the specifications under the supervision of the contracting officer had ever before that time considered that their decisions with reference to the mine cars and the use of the third shovel were not made final by the contract, or that such decisions were required to be appealed to the head of the department. On the contrary, the record shows that on occasions when plaintiff was protesting to the contracting officer and his authorized representative that the action which they had taken with respect to the mine cars was unauthorized by and contrary to the terms and conditions of the contract plaintiff was told by them, in effect, that they had full and complete authority to decide anything in connection with the work, that the decisions of the contracting officer were final, and that plaintiff could do nothing about it. Certainly the decision of the contracting officer to use the third shovel was not a decision of a question of fact, and he did not then and has not since claimed that it was. He insisted at the time that the contract gave him the right to place the third shovel on the work. The language

of Art. 12 of the printed contract form, as well as that of the specifications, was clearly to the effect that the decision of the contracting officer should be final with reference to the matters specifically mentioned therein, and unless something can be found in the contract and specifications or in the nature of the work or the conditions under which and the place at which it was to be performed to indicate that something else was intended full effect must be given to the ordinary and natural meaning of the language used. Art. 1 of the printed contract made the specifications a part thereof; and Art. 12 of the printed contract stated that "Except as otherwise specifically provided in this contract," disputes on questions of fact arising under the contract should be decided by the contracting officer subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision would be final. The principal exception to Art. 12 is found in paragraph 15 of the specifications, quoted in finding 10, which provides that "The decision of the contracting officer as to the suitability of equipment and operators, and as to adequacy of cooperation, shall be final." See, also, paragraph 10 (b), finding 4; paragraph 12, finding 7; paragraph 5, finding 8, and paragraph 14, finding 9.

When this phase of the case is considered we think that the contracting officer so interpreted the contract until October 21, and we also think it is manifest from the way in which the specifications were worded that it was intended at the time the contract and specifications were prepared for execution that as to the matter specifically referred to in the specifications the decision of the contracting officer should in the circumstances be final if made in good faith rather than a decision by the head of the department. The work here involved was located approximately 5,000 miles from the office of the head of the department. The location of the work and the character thereof, especially with reference to the specific matters concerning which the specifications made an exception to the provisions of Art. 12 of the printed contract form relating to appeal, made it advisable, if not necessary, as well as in the interest of the Government, that such matters be finally decided and disposed of upon the

ground as the work progressed. *Cf. Ripley* v. *United States*, 223 U. S. 695, 696, 702. The matter of whether the mine cars were capable of dumping in a satisfactory manner was one which only the contracting officer was in a position properly to decide. The same is true with reference to the matter of whether the operation of the equipment, the operators, and the mine cars were satisfactory "under the provisions of this specification" or whether the equipment, operators, or mine cars were suitable under the terms of the contract to perform the work required. It seems reasonable to suppose that if the Government had intended in this situation that the final decision as to these matters should be made only by the head of the department, the contract or specifications would have so stated. Unquestioned authority was given the Secretary of War to make the contract and he in contemplation of law made it when it was signed by the contracting officer and the Division Engineer, and as the head of the department he doubtless could have reviewed the decisions of the contracting officer which were made in this case had plaintiff taken the matter to him, *United States* v. *Barlow*, 184 U. S. 123, 137, but under the language and terms of the contract plaintiff was not compelled to do so as a condition to his right to sue. If it had been intended by the Government when the contract was prepared that the decision with reference to the particular matters with respect to which the language vested authority in the contracting officer to decide, even without approval of the Division Engineer, should be finally decided by the head of the department, we think the specifications would have contained, in addition, some language to indicate such an intent. For the reasons stated we think this case is to be distinguished from the case of *Fred R. Comb Co.* v. *United States*, 100 C. C. 259.

Even if we assume, which assumption we think is not justified in this case, that decisions of the contracting officer on questions of fact were required by this contract to be appealed by the contractor to the head of the department and that only the decisions of the head of the department were final, we do not think that under the facts and circumstances disclosed by the record the decisions which the con-

tractor actually made were decisions of questions of fact within the meaning of Art. 12. The only factual feature of the decision with reference to the slowness of the mine cars was that the defendant and not plaintiff was failing to perform its duty under the contract, and there is practically no dispute about that. It would be odd to say that the contractor was required by Art. 12 of the contract to protect the Government against actions of its own officers. However, plaintiff did everything he could to convince the contracting officer that the Government could easily perform the particular duty required of it under the contract, and it would seem obvious that plaintiff was not required to do more. If the mine cars were not satisfactory under the terms of the contract, plaintiff had a right to make them satisfactory, but if, as was the case, the Government wanted greater capacity, it was required to change the terms of the contract by mutual consent and pay for such change. *C. and N. W. R. R. Co.* v. *United States*, 104 U. S. 681, 685. Since it refused to do so it breached the contract. The decision with reference to the use of the third shovel is not claimed to have been a decision of a question of fact.

The next question is whether the allegations of the petition are sufficient to entitle plaintiff to recover such damages as he may have sustained by reason of breaches of the contract by defendant. The petition alleges a breach of the written contract and prays for general relief. The petition sets forth facts in sufficient detail to show that defendant breached the contract, and the petition specifically alleges that by the actions of the contracting officer the defendant "repudiated and breached the said written contract and prevented the plaintiff from continuing with the operation of the said machinery in the manner provided by the said contract * * *." In addition plaintiff described the actions of the contracting officer and alleged that from these various actions of the contracting officer there arose an implied contract on the part of the Government that plaintiff would be paid the reasonable value of all labor, services, material, and equipment provided by him plus a reasonable profit.

Upon all of the facts as alleged in the petition, plaintiff prayed "that process issue according to law and that upon a

hearing of the facts and law herein, this Court grant judgment against said Defendant in favor of the Plaintiff in the sum of $48,975.01, together with interest at the legal rate from January 7, 1937, and for such other relief as may be meet and proper in the premises."

Under these allegations and the prayer for general relief the court may allow plaintiff judgment by way of compensation for the damages sustained in such amount as is fairly and reasonably shown by the proof to have resulted from defendant's breaches of the written contract. *Clark* v. *United States*, 95 U. S. 542, 543; *United States* v. *Behan*, 110 U. S. 338, 347; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551, 552; *Bulkley* v. *United States*, 7 C. Cls. 543, 549, 550, affirmed 19 Wall. 37, 41.

The defendant takes the position that plaintiff has grounded his action entirely and solely upon a contract implied in law and contends that inasmuch as this court does not have jurisdiction to hear and determine cases arising under contracts implied in law the petition must be dismissed. But we think this contention of the defendant is not well taken in view of the allegations of the petition and the facts set forth therein. The fact that a claimant may, in addition to alleging a breach of the written contract and praying for general relief, also claim on *quantum meruit* under an implied contract not shown to have been a contract implied in fact does not deprive this court of jurisdiction to adjudicate the claim and render judgment for damages proven for breach of the written contract if the damages so proven are within the fair scope of the facts alleged in the petition. The Court so held in *United States* v. *Behan*, *supra*, at p. 347, in which the Court said:

> The particular form of the petition in this case ought not to preclude the claimant from recovering what was fairly shown by the evidence to be the damage sustained by him. * * *. In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a

liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition.

See also, *John Hays Hammond* v. *United States*, 95 C. Cls. 464, and the cases therein cited at pp. 469, 470.

In *Clark* v. *United States*, 95 U. S. 539, the court also said at pp. 542, 543:

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. * * *.
>
> If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

In *Electric Boat Company* v. *United States*, 66 C. Cls. 333, 377, the Court said:

> The proof offered is in our opinion the best evidence of the loss available, and establishes with certainty the extent of the same. The judgment awarded is not the judgment sought in the petition, plaintiff contending for the amount of increases plus a reasonable profit. The court, however, is authorized under our forms of pleading to award a judgment in accord with the facts stated and proven, notwithstanding the absence of a count in the pleadings for the particular recovery. *Wood et al.* v. *United States*, 49 C. Cls. 119, *Clark* v. *United States*, 95 U. S. 539.

In *Hampton, Executor, etc.*, v. *United States*, 82 C. Cls. 162, 172, 173, the Court said:

> Plaintiff proves that the reasonable value for dredging the above quantity of material is $26,351.32, i. e., at the

rate of 32½ cents per cubic yard, and for this sum judgment is sought, upon an alleged implied contract to pay for the same on the basis of *quantum meruit*.

The first important question is whether such a cause of action is available to plaintiff. The petition contains no allegation of breach of contract, no charge of misrepresentation or the withholding of information upon the part of the defendant. All that is alleged and established by the record is the fact that an error was made in the drawings of and by the defendants to which the contractor was entitled, and which when corrected caused the contractor to excavate under the contract a large quantity of material in excess of what he otherwise would have had to do.

The subject matter of the contract involved was manifestly dredging. The area to be dredged, and the depth, width, and length of the channel were approximately specified, and the contractor not only entered upon performance, but continued work under the contract and the supervision of defendant's officials acting as inspectors and contracting officers. The fixed consideration for the contract was paid the contractor, less the retained percentages, and accepted. To now insist that the contractor's rights are determinable as though no express written contract for the work claimed for existed, is, we think, untenable. * * *

The remaining vital issue is whether the plaintiff may recover for this item under the written contract set forth in the findings. We might well assume, in view of the allegations of the petition and plaintiff's contentions thereunder, that defendant's liability under the written contract is nonexistent. However, our rules of pleading exact consideration of the facts as established and alleged in the petition, irrespective of plaintiff's application of the same.

See, also, *Bull* v. *United States*, 295 U. S. 247, 263; *Devlin* v. *United States*, 12 C. Cls. 266; *Cape Ann Granite Co.* v. *United States*, 20 C. Cls. 1; *Parker* v. *United States*, 26 C. Cls. 344; *M. A. Long Co.* v. *United States*, 79 C. Cls. 656.

In the case at bar it is true, as defendant contends, that there was no contract implied in fact with reference to the matters which form the basis of suit separate from or in addition to implications arising from the written contract. The contracting officer did not at any time promise expressly or impliedly to pay plaintiff a greater sum than the contract

price at the rental rate stated therein. There was therefore no contract implied in fact. *Hawkins* v. *United States*, 96 C. Cls. 689, 697; *Baltimore & Ohio Railroad Co.* v. *United States*, 261 U. S. 592, 597. In the *Hawkins* case, *supra*, the Court said, at pp. 697, 698:

> When a special contract for work and services has been abandoned and put an end to, if the employer has derived some benefit from work done under it, he may be made liable upon an implied promise to make reasonable remuneration in respect to such work. * * *
>
> Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum*. * * *.
>
> * * *, where the service is performed under an express contract, there can be no recovery where there is no proof of a breach of the agreement. When there is a breach of the agreement, an action will lie for the breach; but, if there be no breach, no action will lie, as an implied assumpsit does not arise in such a case, unless it be shown that the parties have abandoned the express agreement, or have rescinded or modified it so as to give rise to such an implication. * * *

But we think it is immaterial to plaintiff's right to recover in this case that there was no contract implied in fact. We think also that it is immaterial that recovery may not in the circumstances of this case be properly measured under the rule of *quantum meruit*, since this was a rental contract under which defendant used plaintiff's employees and equipment until completion rather than a construction contract at a fixed sum, and, also the Government did not, when plaintiff ceased further performance, put an end to the completion of the contract, as was the case in *Behan* v. *United States*, *supra*, and *Spearin* v. *United States*, *supra*. Compare also *Anvil Mining Co.* v. *Humble*, *supra*, where the contractor was ordered to stop the work. In the *Behan* case, the Court said, at p. 345:

> * * *. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making

allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

In the instant case plaintiff ceased to perform further under the contract on October 7, 1936; the defendant did not put an end to the written contract but expressly continued it in force and proceeded to complete it with plaintiff's force and equipment, and charged all costs of completion against the amount determined to be otherwise due under contract at the rental rate stated therein. Plaintiff's abandonment of the work by reason of the breach by the defendant, was not a rescission of the contract, and plaintiff did not lose his right in these circumstances to claim damages for the use of and damage to his equipment during the period of completion and to object to unauthorized charges against him during the subsequent period of completion by defendant under the contract. Nor did he lose his right, when the work had been completed, to claim such balance as may have been due under the contract. *Cf. Quinn* v. *United States*, 99 U. S. 30, 32–34. If defendant had rescinded or put an end to the contract when plaintiff on October 7, 1936, refused to perform further, and had abandoned the project or had completed the work itself and at its own cost, as was done in *Behan* v. *United States*, *supra*, and *Spearin* v. *United States*, *supra*, the situation of the parties would have been different, and the rule of the *Behan* and *Spearin* cases for measuring damages in such a situation would have to be applied.

In *Anvil Mining Co.* v. *Humble*, *supra*, the Court, at pp. 551, 552, said:

It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction [to the jury]. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may

abandon it, and recover as damages the profits which he would have received through full performance. [Only profits were claimed in this case.] Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused.

It is clear from the facts alleged in the petition that plaintiff is seeking to recover compensation by reason of the acts of defendant which, it is alleged, constituted breaches of the written contract. The amount specifically computed and claimed under the implied contract theory may or may not equal the actual damages properly measured which the proof shows the plaintiff sustained by reason of breaches of the written contract by defendant. A plaintiff may, where the proof shows more damage than is claimed, be allowed to amend the prayer of his petition to conform to the proof. We think the allegations of the petition are sufficient to state a cause of action for damages for breach of contract.

The last question concerns the proper measure under the circumstances of this case of plaintiff's damage and the amount thereof fairly and reasonably established by the proof. On this phase of the case it is argued by defendant that if it be assumed that there was a breach of the written contract plaintiff still could not recover as for the breach, since it does not appear from the record, nor from plaintiff's brief, to what extent, if any, plaintiff was injured by the alleged breach of the contract. It is further argued that the proper and only measure of damage for breach of the contract is the difference between the amount actually

received by plaintiff and what he would have received had the defendant performed its part of the contract. In other words, it is argued, the question is simply: How much is plaintiff worse off because of the failure of the defendant to perform?

We think the contentions of the defendant that plaintiff has not alleged facts sufficient to state a cause of action for breach of contract or that he has not fairly and reasonably proved an amount as damage sustained cannot be sustained. The defendant contends, in effect, for the rule of damage frequently stated that the amount that would have been received if the contract had been kept is the measure of damage if the contract is broken. That is, of course, one rule for measuring damages. But there are important variations of this rule to fit particular cases, depending upon the nature and effect of the breach and the extent of the actual loss resulting therefrom. There is no hard-and-fast rule for the measure of damages in every case for a breach of a contract.

There can be no doubt in this case that plaintiff has proved that the contract was breached and that he was damaged as a result of defendant's breaches of the contract. We are of opinion that plaintiff has submitted proper and adequate proof as to the damages which resulted from defendant's breaches, from which proof the measure of damages sustained by plaintiff and the amount of actual damages so sustained can be fairly determined by the Court with reasonable accuracy. Absolute certainty as to the amount of damages is not essential, this being a matter for determination according to the circumstances of each case. There is no objection to damages that they are difficult to ascertain, depending upon contingent and uncertain events, for in all actions for damages for breach of contract the foundation or underlying principle is full compensation for the wrong done. The general rule is that the compensation shall be equal to the injury. The breach is the standard by which the compensation is to be measured, and all that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the breach of the contract for which the suit is brought. *Dow* v. *Humbert et al.*, 91 U. S. 294; *Hetzel* v. *Baltimore & Ohio Railroad*

Co., 169 U. S. 26, 37–39; *Eastman Kodak Company* v. *Southern Photo Material Co.*, 273 U. S. 359; *Story Parchment Co.* v. *Paterson Parchment Paper Co. et al.*, 282 U. S. 555, 562, 563; *Baker* v. *Drake*, 53 N. Y. 211, 220. In *Hoffer Oil Corporation* v. *Carpenter*, 34 Fed. (2d) 589, 592, the court said:

> A person who has violated his contract will not be permitted to reap advantage from his own wrong, by insisting upon proof which, by reason of his breach, cannot be furnished. * * *.
>
> A party, who has broken his contract, will not be permitted to escape liability because of the lack of a perfect measure of the damages caused by his breach. * * *.
>
> A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient.

Where a breach of a contract interferes with the proper performance of a contract in accordance with its terms, the injured party may recover damages to the extent at least of any loss which was the necessary consequence of such interference. *United States* v. *Smith*, 94 U. S. 214; *Parish* v. *United States*, 100 U. S. 500; *United States* v. *Barlow*, 184 U. S. 123. The fact that he might recover more by way of lost profits, if proven, is not fatal. As a part of the damage sustained for breach of contract, anticipated profits prevented by the breach may also be recovered where properly proven. *Howard* v. *Stillwell and Bierce Manufacturing Company*, 139 U. S. 199, 205, 206; *United States* v. *Behan*, 110 U. S. 338; *Anvil Mining Co.* v. *United States*, 153 U. S. 540, 549; *Suburban Contracting Co.* v. *United States*, 76 C. Cls. 533, 543.

Since compensation is a fundamental principle of damages for breach of contract, the party who fails to perform his contract or interferes with or prevents the other party from performing it according to its terms is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Miller, et al.* v. *Robertson*, 266 U. S. 243, 257; *Illinois Central Railroad Co.* v. *Crail*, 281 U. S. 57, 63.

In the present case the plaintiff in the petition, in which he alleged a breach of contract and prayed for general relief, made claim for the specific sum of $48,975.01 on the basis of the reasonable value of labor, services, and materials furnished by plaintiff in an effort to perform the contract until October when the defendant, on that date, by reason of past actions and action then taken, rendered further performance by plaintiff in accordance with the contract impossible. This amount was computed on the basis of cost of labor, services, materials, insurance, and damage to tunnel shovels in the total amount of $49,377.14 plus a reasonable profit of 15 percent upon that sum amounting to $7,406.57, totaling $56,783.71. From this amount there was deducted the amount alleged to have been paid and received of $7,808.70, leaving a balance of $48,975.01. The correct figures on this basis of computation are set forth in findings 62 and 63, and they show a balance after deducting the correct amount of $7,818.70 paid to and received by plaintiff from defendant, of $47,693.17.

If in the circumstances of this case it were necessary to limit plaintiff's recovery of damages for defendant's breaches of contract to allowance of the costs of labor, services, and materials furnished, to the date on which plaintiff ceased to further perform the contract, and the damage to the tunnel shovels, it would be necessary to deny the item of profit for the reason that it has not been shown by clear and direct proof, which the law requires in connection with recovery of anticipated profits, what amount of profit plaintiff would have made if he had been permitted to perform the contract in accordance with its terms. It is not sufficient to the allowance of anticipated profits to use a percentage of expenditures on a cost-plus basis. Direct, as distinguished from speculative, profits must be proved. If plaintiff's damages in this case are required under the petition and the proof to be measured as above stated, the amount recoverable would be $40,452.49. However, in view of the nature of this contract and in view of the nature of the breaches of this contract by defendant and the evidence of record, which shows with reasonable certainty the amount of various items of the actual damage sustained by reason

of defendant's breaches and the amount still due under the contract as it was actually performed, we think the measure of plaintiff's damages is not limited in this case to the cost of labor, services, and materials, furnished by plaintiff to the date on which he ceased to further perform the contract, less what he received from the defendant. Whether, in the circumstances of this case, plaintiff would be entitled to recover under the *Behan* and the *Spearin* cases, *supra*, at least the amount of $40,452.49, computed as above-mentioned, we need not decide for the reasons (1) that in this case we are dealing with a contract for rental of equipment rather than a construction contract; (2) that plaintiff proceeded for a month and a half, notwithstanding defendant's breaches of the contract, in an effort to perform; (3) that when the defendant again breached the contract in another important respect and plaintiff refused to continue in his attempt to perform, the defendant, instead of terminating or rescinding the contract, expressly kept it in force and completed it with plaintiff's employees, equipment, and materials at plaintiff's expense; and (4) that the proof establishes an amount of damages actually sustained in performance of the contract to completion with plaintiff's employees and equipment in the way in which the work was actually performed and completed.

In the case at bar the proof submitted by plaintiff establishes and we have found as facts (see tabulation in finding 64) that plaintiff suffered actual damages in connection with the use of his equipment and employees in performance of the contract in suit, including the amount still due under the contract, of $47,852.85. In addition to the items of damage making up this amount, plaintiff might also have recovered as an item of damage the profit which he lost under the rental contract by reason of defendant's breaches thereof, which resulted in the contract being completed about eleven months earlier than it would have been completed, except for such breaches by the defendant, but the proof does not show what the amount of such profit would have been (see finding 55).

With reference to the seven items of damages sustained by plaintiff totaling $47,852.85, as set forth in finding 64,

little need be said in addition to what has been set forth in the findings.

The first item relates to penalties totaling $2,755.87 charged against plaintiff under purported authority of Par. 12 of the specifications quoted in finding 4 for a total of 417 hours' and 32 minutes' delay. This penalty did not come under the liquidated damage provision of the contract as contained in Art. 5 and in Par. 5 of the specifications. The only liquidated damage provided for in the contract was for failure of plaintiff to commence operations at full capacity within 32 days after receipt of notice of award of contract.

The proof shows and we have found as a fact that the delay for which plaintiff was charged a penalty of one-half of the rental rate for each shovel so delayed was mainly, if not entirely, the result of defendant's breach of the contract through the use of trucks, tractors, and bull-dozers. For this reason the defendant did not have the right to charge plaintiff with this penalty. *United States* v. *United States Engineering and Contracting Co.*, 234 U. S. 236; *Greeley Iron Works* v. *United States*, 66 C. Cls. 328; *Standard Steel Car Co.* v. *United States*, 67 C. Cls. 445; *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 76 C. Cls. 154; *Graybar Electric Co., Inc.*, v. *United States*, 90 C. Cls. 232. The Government cannot claim the right to retain this penalty on the ground that some delay for which a penalty might have been asserted might have occurred in any event. By its breaches of the contract the defendant rendered it impossible to determine what delay, if any, would otherwise have occurred.

What has been said above with reference to Item 1 sufficiently explains Item 2, in the amount of $2,755.87. This amount represents the unpaid rental due under the contract for the period of delay above mentioned, which rental the defendant deducted in addition to the penalty collected. Since the defendant, rather than plaintiff, was responsible for this delay, plaintiff is entitled to recover this unpaid rental.

The third item of damage relates to the use of additional 30-pound rail which the contracting officer compelled plain-

tiff to furnish and which the proof shows was neither necessary nor required under terms of the contract. The cost of this additional rail was $3,160.69. This action of the contracting officer was a breach of the contract as shown by finding 33, and plaintiff is entitled to recover this amount.

The fourth item of damage relates to the cost of $4,539.83 (finding 50) for extra spare parts for the shovels purchased by defendant and charged to plaintiff against amounts otherwise determined to be due under the contract during the period of completion of the contract by defendant.

The proof satisfactorily shows that these extra parts were made necessary by reason of defendant's breach of the contract which resulted in injury and damage to the mechanism of the shovels, for which the extra parts were used, and if the defendant had not breached the contract by using trucks instead of mine cars these extra parts would not have been necessary. Plaintiff is therefore entitled to recover this amount.

The fifth item of damages represents the reasonable rental value of the third 60 hp. shovel used by defendant on the work in addition to two 30 hp. shovels specified in Art. 1 of the contract. The defendant clearly did not have the right under the contract to use this third shovel on the work without becoming liable to plaintiff for the reasonable rental value thereof, which the evidence satisfactorily shows (finding 44) was $10,130.40 for the period during which it was used from October 13, 1936, to January 7, 1937, inclusive. This shovel was more powerful and had a much larger capacity than either of the 30 hp. shovels. Plaintiff is entitled to recover this amount.

The sixth item relates to damage in the amount of $21,331.25 to the three shovels (finding 60) as a direct result of defendant's breach of the contract. The proof shows that these shovels were damaged by defendant by the use of the trucks to such an extent that at the end of the work they were valueless, except for junk, and that if the defendant had not breached the contract by using trucks in connection with the operation of these shovels they would have been in good condition at the end of the work, ordinary wear and tear of not more than 10 percent of their value

at the beginning of the work excepted; such wear and tear and the junk value of the machines have been deducted from their actual fair market value at the beginning of the work in arriving at the damage of $21,331.25 found to have been sustained. Plaintiff is entitled to recover this amount.

Item 7 represents the amount of $3,179.04 still due under the contract, including the retained percentages as computed by defendant (finding 50). This amount plaintiff is also entitled to recover.

Plaintiff also claims interest on the damages sustained, but under the provisions of section 177 of the Judicial Code interest as a part of damages for breach of contract cannot be allowed.

The total of the items we have found to be recoverable is within the total amount claimed by plaintiff in the prayer of his petition. Judgment will be entered in favor of plaintiff for $47,852.85. It is so ordered.

WHALEY, *Chief Justice*, concurs in the result only.

MADDEN, *Judge*, concurring:

I agree with the court's conclusion that the contracting officer's conduct was such as to invalidate his decision as to the matters in controversy, and that, under the contract, the plaintiff had no right or duty to appeal to the head of the department from the contracting officer's rulings. I would not decide whether the matters in controversy were, or were not, of the kind which were intended to be covered by the provisions of the contract purporting to give finality to the rulings of the contracting officer, nor whether, if the parties so intended, their agreement to that effect was legally valid. I agree that the plaintiff is entitled to recover.

WHITAKER, *Judge*, concurring:

The defendant's action in substituting trucks for the mine cars and in putting the third shovel on the job was a clear breach of its contract with plaintiff. Whether or not these actions constituted a breach is not for the contracting officer to decide. Jurisdiction of such controversies is conferred on this court by Congress. Section 145 of the Judicial Code

gives an aggrieved contractor the right to sue for a breach of his contract. This right cannot be taken away from him by the administrative agency with which he deals.

So, whether or not the decision of the contracting officer is arbitrary or grossly erroneous is immaterial. We are not bound by it, whether it was or was not.

I agree plaintiff is entitled to recover the sum of $47,852.85.

JONES, Judge, took no part in the decision of this case.

ARCHIBALD E. LIVINGSTON v. THE UNITED STATES

[No. 45016. Decided May 1, 1944]

On the Proofs

Government contract; a strike in the supplying mill "unforeseeable" by contractor; liquidated damages; failure of contracting officer to make required decision.—A strike in the mill from which contractor had engaged to purchase, and did purchase, goods to be sold to the Government and delivered under an agreed schedule, was "unforeseeable" on the part of the contractor, plaintiff; and under Article 15 of the standard Government contract the plaintiff was not liable for liquidated damages for delay in delivery caused by said strike.

Same; failure of contracting officer to make decision a denial of contractor's rights under the contract.—Under the provisions of Article 15 of the standard Government contract, the plaintiff, contractor, was entitled to the contracting officer's unbiased decision on the merits on the delay caused by a strike in the mill from which the contractor had engaged to secure goods to be delivered under his contract with the Government; and the contractor was likewise entitled, under the contract, to the right of appeal from the findings of the contracting officer, if adverse, to the head of the department; and failure of the contracting officer to make a decision was a denial of contractor's rights.

Same; supplying mill not a subcontractor.—Plaintiff was required to name the source from which he intended to procure and deliver the goods covered by his contract with the Government but there was no subcontractual relationship existing between plaintiff and the mill which manufactured and supplied the goods. See *Collier Manufacturing Co.* v. *United States*, 61 C. Cls. 32, 37; certiorari denied, 271 U. S. 680.

Same; action of Comptroller General not authorized under the contract a nullity.—Where the contracting officer made no decision on contractor's request for extension of time and release from liquidated damages, as he was required to do under the provisions of the contract; and where such request was instead referred by the contracting officer to the Comptroller General, who rendered a decision thereon, ruling that the contractor was subject to liquidated damages, which were accordingly assessed and deducted; it is *held* that the decision of the Comptroller General was not only legally erroneous but without warrant of law, and plaintiff, contractor, is entitled to recover.

The Reporter's statement of the case:

Mr. Edward E. Elder for the plaintiff. *Mr. John T. Noonan* was on the briefs.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, a citizen of New York, N. Y., brought this action for the use and benefit of Naumkeag Steam Cotton Company, a corporation organized under the laws of Massachusetts (hereinafter referred to as "Naumkeag"). Naumkeag is and, at all times material to this suit, was one of the largest manufacturers of cotton sheets and pillowcases in the country. It has a mill in Salem, Massachusetts, and a bleachery, known as the Danvers Bleachery, at Peabody, Massachusetts.

2. From April 1907 to the date his testimony was taken, plaintiff was employed by the partnership of Parker, Wilder & Co., a firm engaged in business as factors or mill selling agents. Their principal office was located at 215 Fourth Ave., New York City. The firm, which was a large one, also maintained a cotton office in downtown New York and had offices in Boston, Chicago, and San Francisco.

3. At all times pertinent to this suit, Parker, Wilder & Co. were the sole selling agents for Naumkeag and handled the entire products of the mill. By written agreement entered into on January 3, 1921, Naumkeag agreed to consign all of the goods which it manufactured (except goods sold at its mill office) to its agents for sale in such markets as the

agents' deemed best for the interests of the principal. Except for immaterial changes, this contract continued in force until October 1, 1936. The agreement, which is in evidence as Plaintiff's Exhibit No. 1, and all other exhibits hereinafter referred to are made a part of this report by reference.

Parker, Wilder & Co. employed salesmen for the sale of Naumkeag's products, handled the billing and some of the advertising, made collections on sales, remitted the proceeds to Naumkeag periodically as provided in the contract, and were paid a commission on the amount of the sales. Parker, Wilder & Co. also acted as sales agents for other mills, but did not handle any products which competed with those of Naumkeag.

Plaintiff was in charge of the accounting for Parker, Wilder & Co. in the office at 215 Fourth Ave., New York City. He was engaged in the woolen division of the firm's business, had authority to sign checks not exceeding $25,000, to arrange for bank loans, and to advise on woolen purchases and loans and advances to woolen mills. He had no connection with the cotton business handled by his employer except to the extent hereinafter shown.

4. July 19, 1935, plaintiff in his individual capacity entered into a written contract with defendant, represented by Capt. E. J. Heller, of the Philadelphia Depot of the Quartermaster Corps, War Department, as contracting officer, for the sale and delivery by plaintiff to defendant of 389,914 cotton sheets and 218,041 cotton pillowcases for a consideration of $316,079.25.

5. Captain Heller, the contracting officer, served in that capacity at the Philadelphia Quartermaster Depot from July 1932 to April 1936. He was in charge of all purchases and entered into many contracts for the purchase of large quantities of materials for the Civilian Conservation Corps. During the period from July 1933 through July 19, 1935, plaintiff submitted a number of bids on cotton goods to Captain Heller, who, as contracting officer, awarded eight contracts to plaintiff on the following dates: (1) October 13, 1933; (2) November 22, 1933; (3) July 21, 1934; (4) October 11, 1934; (5) January 7, 1935; (6) January 14, 1935; (7) February 21,

1935; and (8) July 19, 1935, the last being the contract upon which this suit is based. These contracts were similar; they were signed by plaintiff in his individual capacity, and provided for the sale to defendant of large quantities of sheets, pillowcases, and mattress covers.

6. The bid submitted by plaintiff for the contract of July 19, 1935, under the heading "Names and Locations of Factories," provided that the bidder should designate the names and locations of the factories where the goods proposed for sale were to be made and prohibited their manufacture at any other place except with the approval of the contracting officer. In the appropriate blank space plaintiff inserted "Naumkeag Steam Cotton Company, Salem and Peabody, Mass." In all of the bids submitted in connection with the eight contracts referred to in Finding No. 5, plaintiff likewise named Naumkeag as the factory where the goods would be made. The information in bids regarding the place of manufacture was used by the contracting officer to investigate and determine whether the factory which the bidder designated was adequate to manufacture the goods in accordance with the contract. The statement of the place of manufacture did not indicate what relationship, if any, existed between the contractor and the manufacturer, and the contracting officer did not consider such information as an indication that the contractor was submitting his bid as an agent for the manufacturer named. During the period covered by the contracts awarded to plaintiff, Captain Heller knew that it was the practice for employees and firm members of some cotton factors to submit bids in their own names for the benefit of the mills represented by the factors. During the same time he also had knowledge that it was the practice of certain brokers, who represented no particular mill, to submit bids naming one or more mills as the place of manufacture, and, upon award of a contract, to shop around among various mills to obtain the goods needed for its performance.

Unless the capacity of the factory named in a bid was known from prior contracts, it was Captain Heller's practice to have it investigated prior to the award of the contract. After the contract was awarded, inspectors serving under

Captain Heller were either stationed at the factory or they made periodic inspections of it during the period of performance. This practice was followed with respect to all of plaintiff's contracts.

7. Plaintiff executed the bid which resulted in the award of the contract of July 19, 1935, as follows:

Firm name:	Archibald E. Livingston
By:	"Archibald E. Livingston" (signed)
Title:	Individual
	215 Fourth Ave., New York, N. Y.

Erratum No. 1 and Addendum No. 1 of the bid were also executed by plaintiff in the same manner. The annual bid bond and annual performance bond which plaintiff submitted as a part of his contract were both executed by him as "Archibald E. Livingston (individual principal)."

Paragraph 9 of the Directions for Preparation of Contract, which were attached to the contract, provided:

> 9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

Plaintiff executed the contract as follows: "Archibald E. Livingston, Contractor." There was nothing in any of the contract documents executed by plaintiff to indicate that he was acting other than in an individual capacity. All of plaintiff's bids and contracts during the period from October 13, 1933, to July 19, 1935, were likewise executed by plaintiff as an individual.

8. Plaintiff's bid and the contract of July 19, 1935, here sued upon, as well as the other contracts referred to in Finding No. 5, were executed by plaintiff as an individual under the following circumstances: A member of the firm of Parker, Wilder & Co. requested plaintiff to sign the contracts in his own name, explaining that it was the custom in the trade

to have employees sign contracts, especially where the price was a little below market price and the selling agents desired to conceal the source of the merchandise from the general cotton trade. Under the contract of July 19, 1935, the Government bought sheets and pillowcases at a price lower than the regular market price. Plaintiff was engaged in the woolen division of the business and was unknown to the cotton trade.

In requesting plaintiff to execute the contract involved in this suit in his name as an individual, Parker, Wilder & Co. were acting as the agents of Naumkeag.

9. In addition to having an inspection made of the adequacy of the various factories named in the bids submitted to him, it was Captain Heller's practice to have the bidder investigated unless he had a satisfactory record of performance under a prior contract. The information obtained by the investigations was kept in written reports which were available to the contracting officer during the period in which the eight contracts were awarded to plaintiff. When plaintiff's first bid came to Captain Heller's attention, he either ordered an investigation, or found that plaintiff had a satisfactory record of performance under a prior contract.

As far back as 1933 Captain Heller knew that Parker, Wilder & Co. was a responsible firm and that they were sales agents for Naumkeag, but he did not know that they were the sole sales agents for Naumkeag.

During 1933 the contracting officer wrote several letters to plaintiff regarding bids and contracts which had been entered into between plaintiff and Captain Heller, as contracting officer for the Government. The replies were usually made by Parker, Wilder & Co. instead of by plaintiff, and several of them made reference to "our Mr. Livingston." In connection with the third contract in the series referred to in Finding No. 5, the contracting officer received a letter from Parker, Wilder & Co., dated July 17, 1934, as follows:

> Referring to Mr. Archibald E. Livingston's bid on the above, bids for which in triplicate are enclosed herewith, beg to advise that Mr. Livingston is a member of our organization. We, the firm of Parker, Wil-

> der & Co., guarantee all commitments made by Mr. Livingston in connection with this bid and guarantee delivery of the merchandise in accordance with specifications in the event of award.
>
> We, as a firm, undertake to supply the material for Mr. Livingston in the event of award of the contract.

When this letter was received, Captain Heller knew that plaintiff was not making the bid individually in competition with his employer but was submitting it for Parker, Wilder & Co. In the ensuing twelve months, five additional and similar contracts, including the contract here involved, were entered into between the same parties. Within that period nothing occurred in connection with any of plaintiff's bids or contracts to change the view held by the contracting officer on July 17, 1934, as to the true capacity in which plaintiff was submitting bids to and contracting with the Government for the sale of cotton goods.

At the time the contract sued upon was executed, the contracting officer had no actual knowledge that plaintiff was then employed by Parker, Wilder & Co. or that he signed said contract in behalf of his employers, the agents of Naumkeag, but from information which Captain Heller obtained from the correspondence referred to and from the course of dealing under the seven prior contracts, he had reason to know such facts.

Prior to July 19, 1935, the contracting officer had no actual knowledge that plaintiff was submitting bids and executing contracts as an agent of Naumkeag, but he knew that the goods furnished for plaintiff's performance of the seven prior contracts were manufactured by Naumkeag, the manufacturer designated in the contract upon which this suit is based.

Although he knew before July 19, 1935, that certain cotton factors had submitted bids in the names of their employees, Captain Heller did not know they used this device for the purpose of concealing the source of the goods when the bids were below the market price.

The invoices covering goods delivered under the eight contracts referred to in Finding No. 5 were headed "Archibald E. Livingston, % Parker, Wilder & Co., Agents for Naumkeag Steam Cotton Co.," but these invoices never came to

the attention of the contracting officer. They went directly to the Paying Finance Officer in the Philadelphia Quartermaster Depot who was under the supervision of the Chief of Finance of the War Department and acted independently of the Depot itself in issuing vouchers for the payment of goods received.

10. The contract provided for deliveries of the sheets and pillowcases in specified quantities to designated depots of the Quartermaster Corps in several cities, and contained a delivery schedule requiring a designated percentage of the deliveries to be made at stated intervals. It also provided that the contractor should pay the Government a sum equal to 1/5 of 1% of the price of each unit as liquidated damages for each calendar day of delay in making deliveries.

11. After a portion of the goods called for by the contract had been delivered, a strike occurred at the mill and bleachery of Naumkeag which completely stopped production in both plants. The strike began August 12, 1935, and continued for about 10½ weeks until terminated on October 23, 1935. The strike by Naumkeag's employees caused all the delays for which liquidated damages were retained by the defendant and none of the delays were caused by Naumkeag.

12. This strike was unforeseeable on the part of plaintiff.

13. August 16, 1935, an employee of Parker, Wilder & Co. called at the Philadelphia Quartermaster Depot, and, in the absence of Captain Heller, delivered to his assistant, Captain Grice, a letter dated August 15, 1935, signed by plaintiff and addressed to the contracting officer, in which written notice of the strike was given and a request made for a three weeks' extension of time for delivery of goods under the contract. Attached to the letter was another letter written by the Treasurer of Naumkeag regarding the strike and the working conditions in the mill. Captain Grice, who had authority to act for the contracting officer during the latter's absence, advised the bearer of the letter that nothing could be done with respect to liquidated damages until the contract was completed; that a claim could then be submitted to the Comptroller General for relief from such damages, but that it should be transmitted through the contracting officer who

would send his recommendation with the claim to the Comptroller General. Captain Grice confirmed this statement in a letter written to plaintiff on August 22, 1935.

14. Article 15 of the contract provided in substance that, if the contractor failed to make delivery of goods within the time specified, he should pay the Government liquidated damages at the contract rate, and contained the further provisos:

> Provided further, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault of negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors:
>
> Provided further, That the contractor shall, within ten days from the beginning of any such delay, notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of the delay and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

15. August 28, 1935, a subordinate of the contracting officer wrote plaintiff acknowledging receipt of information regarding the strike. The letter stated that the sheets and pillowcases were urgently needed; that plaintiff should obtain a new source of supply, and that unless he could make deliveries on schedule, it might become necessary for the defendant to purchase the "delinquencies" in the open market and charge any additional cost to plaintiff's account. This subordinate was without contractual authority.

After receipt of this letter, Mr. Galley, an employee of Parker, Wilder & Co., went to Philadelphia and discussed with the contracting officer the situation created by the strike and the procedure to be followed in obtaining a refund of any liquidated damages retained by defendant. Captain

Heller reiterated the instructions given by Captain Grice to the effect that plaintiff's claim would have to be filed with the Comptroller General upon completion of the contract. Captain Heller also stated that the "strike clause" in the contract protected plaintiff and that if the procedure previously outlined were followed, refund of the amount withheld as liquidated damages would follow as a matter of course.

After the interview with the contracting officer, Galley prepared and mailed on September 16, 1935, a reply to the letter of August 28, 1935, referred to above. The reply, which had a number of exhibits attached, was signed by plaintiff, addressed to the Philadelphia Quartermaster Depot, and stated in part as follows:

> We hereby claim relief from liquidated damages because of any delay in delivery on this contract due to the strike at our mill, the Naumkeag Steam Cotton Co., manufacturer of the sheets and pillowcases for this contract.
>
> Relief is claimed under Article 15, Sheet 4, of the contract in reference to Delays and Liquidated Damages, applicable to our case and from which we quote as follows: * * *

16. The contracting officer made no findings on the delay or extent thereof, except as appears in Finding No. 18 herein. On September 17, 1935, he wrote the plaintiff as follows:

> Receipt is acknowledged of your letter dated September 16th in which you claim relief from liquidated damages on account of delayed deliveries of bed sheets and pillowcases under Contract W-669-qm-ECW-273, due to existence of a strike in your producing mill, the Naumkeag Steam Cotton Company.
>
> This office is without authority to grant the relief requested and it would be useless, in view of the fact that the contract has not yet been completed by you, to submit your letter to higher authority, as partial settlements under a contract are not practicable.
>
> After you have completed the contract and the amount of damages has been definitely fixed, you may then address a claim for the same to The Comptroller General of the United States, Washington, D. C., forwarding it under cover to this office for action and transmission as addressed.

Plaintiff did not request the contracting officer's permission to procure goods at a factory other than Naumkeag. Proof is lacking as to whether or not plaintiff could have obtained goods from other mills meeting the requirements of the contract in time to make deliveries in compliance with the contract.

17. Shortly after the strike began, plaintiff obtained permission to substitute a quantity of oversize sheets for the same amount of smaller and less expensive sheets called for by the contract, but was not able to make further deliveries from Naumkeag until the strike was terminated. On account of the resulting delays in deliveries, the defendant, pursuant to the provisions of the contract, deducted $16,895.25 from the contract price as liquidated damages. Except for such delays, plaintiff fully performed the contract. Plaintiff's claim is for the remission of the amount retained as liquidated damages.

18. In accordance with instructions previously given by the contracting officer, a claim for refund of liquidated damages deducted under the contract was prepared in the name of plaintiff under date of January 7, 1936, addressed to the Comptroller General, and mailed to the contracting officer. The basis of the claim was that the delay was caused by the strike in the mill of Naumkeag, and that such a delay was excusable under the provisions of Article 15 of the contract. A number of supporting letters and papers were attached to the claim, including some which plaintiff's letter said would show that "Mr. Archibald E. Livingston, Parker, Wilder & Co., Naumkeag Steam Cotton Company, and Danvers Bleachery have been and are an integral part of each other, and that the Government has had notice thereof."

Upon receipt of the claim, the contracting officer caused an investigation to be made which consisted of a review of office records showing the dates and quantities of goods delivered under the contract and a verification, through the report of an inspector, of the occurrence of the strike in the mill of Naumkeag. The contracting officer did not investigate the statements in plaintiff's claim regarding the relationship which was alleged to exist between plaintiff, Parker, Wilder

& Co., and Naumkeag. February 4, 1936, after concluding the investigation, the contracting officer issued a certificate, which was required under Army regulations and was forwarded to his superior officer. The certificate was an interdepartmental memorandum and no copy of it was sent to plaintiff. In it the contracting officer found:

> That the Naumkeag Steam Cotton Company was a subcontractor under the contract in question and bore no responsibility to the Government for proper performance under the terms of the contract; and
> That the delays in deliveries were due to a strike in the mill of a subcontractor, and such strike did not act to relieve the claimant from the payment of liquidated damages properly chargeable under the terms of the contract.

This conclusion was arrived at on the basis of a report made by an inspector who investigated the strike at Naumkeag and on the basis of the contracting officer's opinion that Naumkeag was a subcontractor since no privity of contract existed between the Government and Naumkeag.

The contracting officer admitted that if he had the certificate to write again, he definitely would not make the finding which is quoted above. Since plaintiff did not receive a copy of this finding, he had no opportunity to appeal therefrom to the head of the department concerned.

19. February 18, 1936, Major Holland, the fiscal officer at the Philadelphia Quartermaster Depot, wrote plaintiff requesting him to submit evidence in support of the statement in his claim of January 7, 1936, to the effect that plaintiff, Parker, Wilder & Co., and Naumkeag Steam Cotton Co. have been and are integral parts of each other. February 24, 1936, plaintiff replied, inclosing with his letter an affidavit executed by the Treasurer of Naumkeag and a member of the firm of Parker, Wilder & Co. The affidavit stated, in substance, that plaintiff was an employee of Parker, Wilder & Co., and that all his dealings with the Government were solely in behalf of his employer as sole selling agents for Naumkeag.

20. December 5, 1936, the Acting Comptroller General issued a settlement certificate rejecting plaintiff's claim on the ground that the delay was caused by a strike in the mill

of plaintiff's subcontractor, which was not a delay excused under the terms of the contract.

21. All payments received by plaintiff from defendant under the contract were turned over to Parker, Wilder & Co. immediately upon receipt thereof, and in turn remitted by Parker, Wilder & Co. to Naumkeag. At the end of each month Naumkeag paid Parker, Wilder & Co. a commission at the agreed rate. Plaintiff has no financial interest in the outcome of this suit, and is under duty to account for and pay to Naumkeag any amount recovered in this suit. Plaintiff has not made any assignment or transfer of his claim.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case involves the interpretation of Article 15 of the standard form of Government contract relating to liquidated damages.

In July 1935 plaintiff in his individual capacity entered into a written contract with the defendant, represented by Captain E. J. Heller, of the Philadelphia Depot of the Quartermaster Corps, War Department, as contracting officer, for the sale and delivery by plaintiff to the defendant of certain cotton sheets and pillowcases for the consideration of some three-hundred-and-odd-thousand dollars. In his bid, in response to the advertisement for bids, plaintiff stated that he would procure sheets and pillowcases from the Naumkeag Steam Cotton Company, with factories located at Salem and Peabody, Massachusetts. A performance bond was given in his individual capacity and guaranteed by a surety company. Plaintiff promised to furnish and deliver the articles to the defendant in installments on certain dates to the Quartermaster depots at New York, Chicago, and Fort Mason, California. The pillowcases and sheets were manufactured by the Naumkeag Steam Cotton Company. Plaintiff fully performed the contract and was paid the contract price with the exception of a certain amount deducted as liquidated damages for delays in compliance with the delivery dates.

Delays in the delivery of the pillowcases and sheets were

caused by a strike of the employees of the Naumkeag Steam Cotton Company which lasted for ten and one-half weeks, during which time the plaintiff was unable to procure the articles from the Naumkeag Steam Cotton Company. The strike started on August 12 and continued until October 23, 1935.

Plaintiff filed with the contracting officer a notice of the strike and requested an extension of time in which to perform the contract and a release from liquidated damages under Article 15 of the contract. The contracting officer informed plaintiff that his request for extension of time and release from liquidated damages was to be made to the Comptroller General but must be filed with the contracting officer who would forward the request to the Comptroller General. The contracting officer did send the request when filed to the Comptroller General and the Comptroller General ruled that the plaintiff was subject to the liquidated-damage clause and assessed liquidated damages in the sum of $16,895.25. The time of delay and the amount of liquidated damages, if plaintiff is liable therefor, are not in dispute.

Article 15 of the contract provides that—

> * * * The contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, * * * strikes * * * but not including delays caused by subcontractors. * * *.

Article 15 further provides that—

> * * * The contractor shall, within ten days from the beginning of any such delay, notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of the delay and his findings of facts thereon shall be final and conclusive on the parties * * *.

The contracting officer failed to pass on plaintiff's notice of the cause of the delay and did not make any ascertainment of the facts or any findings of fact thereon. He forwarded the notice to the Comptroller General, who had no authority to pass on these facts or make a decision. The Comptroller General's act was a nullity.

Plaintiff was deprived of one of the rights given him under his contract. He was entitled to the contracting officer's unbiased decision on the merits of the delay. Plaintiff was also entitled to the right to appeal from the findings of the contracting officer to the head of the department. This right also plaintiff was denied through the action of the contracting officer. There is a complete failure on the part of the contracting officer to perform his duty.

However, when the contract was completed, $16,895.25 was deducted from the plaintiff's contract as liquidated damages on the ground that the Naumkeag Steam Cotton Company was plaintiff's subcontractor and therefore plaintiff was removed from the "unforeseeable" clause in the contract.

Plaintiff was required to name the source from which he intended to procure and deliver the pillowcases and sheets in order that the Government could have supervisors at the mill, from which the articles were to be procured, to inspect the conditions under which the manufacturing was done, but there was no subcontractual relationship existing between plaintiff and Naumkeag. See *Collier Manufacturing Co. v. United States*, 61 C. Cls. 32, 37, certiorari denied, 271 U. S. 680.

The question now arises as to whether the strike was unforeseeable. If it were, then plaintiff is not liable for the assessment of liquidated damages.

The evidence shows that from 1933 to 1935, the year in which this contract was entered into, plaintiff had entered into and executed seven contracts with the same procurement officer, and in each contract he was named as the individual contractor, and in each contract he had named the Naumkeag Steam Cotton Company as the source from which he intended to procure the articles named in the contracts. All these contracts were successfully carried out, completed, and paid for on time. No question arose over delays or any other matter which would throw doubt on the capacity of the plaintiff to perform the contract or on the source from which he was to procure the articles.

The strike at the Naumkeag Steam Cotton Company could not have been foreseen. The undisputed evidence shows that it was brought about by a demand for higher wages when the

company at the time was paying the highest wages in the textile industry. There was no possible way for the plaintiff to have anticipated that there would be any walk-out at the Naumkeag Company which would have retarded the production of the articles manufactured and procured to fulfill his contract with the Government.

Article 15 contains a provision making inexcusable "delays *caused* by subcontractors." Subcontractors do not *cause* acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or unusually severe weather. Delays due to any of these causes are therefore not "delays caused by subcontractors."

The reason for excluding delays that are caused by subcontractors is plain. If the excluding clause were not in the contract, a contractor who was delayed by an inefficient subcontractor could well say that he was delayed by an unforeseeable cause—he had no way of knowing that his subcontractor would fall down on the job.

If the delay is really caused by the subcontractor, the contractor has his recourse against the subcontractor to recover liquidated damages imposed upon him by the Government.

Whether the delay is in the plant of the contractor or in the plant of the subcontractor is a matter of indifference. It might be a freight embargo from New York to Baltimore, where the subcontractor's place of manufacture was located in New York, and the contractor's stock pile in Philadelphia, and the place of final delivery a Government warehouse in Baltimore. The delay in shipment out of New York would be tied up with the delay in shipping out of Philadelphia. One could not say a part was inexcusable because chargeable to the subcontractor and a part excusable because otherwise chargeable to the contractor.

The decision of the Comptroller General is not only legally erroneous but without warrant of law.

Plaintiff is entitled to recover the sum of $16,895.25.

It is so ordered.

LITTLETON, *Judge*, concurs.

WHITAKER, *Judge*, concurring:

I concur that the strike in the Naumkeag mills was not a delay caused by a subcontractor, but was one of those "unforeseeable causes" for which the contractor was excused and, hence, that the deduction of liquidated damages was unwarranted. I agree that the plaintiff is entitled to recover.

I think it is unnecessary to decide whether the Naumkeag Company was plaintiff's subcontractor.

MADDEN, *Judge*, concurs in the foregoing opinion.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM T. BUTLER v. THE UNITED STATES

[No. 45173. Decided May 1, 1944]

On the Proofs

Annual leave of Government employees; not an increase in pay nor a bonus; employee has no vested interest therein; right to annual leave lost upon termination of service.—Annual leave is not a Congressional device to increase an employee's pay, but is granted to a Government employee in the nature of a refresher, to afford surcease from an employee's labors for the common weal and to enable him to come back with fresh zeal to carry on in his country's service. *Harrison* v. *United States*, 26 C. Cls. 259, 269, cited.

Same; not a bonus.—Annual leave for a Government employee was never designed as a bonus upon separation from the service.

Same; right to annual leave ceases upon termination of service.—Only an employee is entitled to annual leave, and after he ceases to be an employee of the Government his right to it ceases.

Same.—If a Government employee resigns before taking the annual leave which he has accumulated, and to which he is entitled, he loses his right to it; and if he dies before receiving it, his estate is not entitled to collect the money value of the accumulated leave. *Harrison* v. *United States*, 26 C. Cls. 259; *Field* v. *Giegengack*, 73 Fed. (2d) 945; 6 Dec. Comp. of Treas. 544; 8 Comp. Gen. 471; 12 Comp. Gen. 602; 13 Comp. Gen. 179; 17 Comp. Gen. 48.

Same; administrative practice as to annual leave recognized by Congress.—In enacting the Act of June 28, 1940 (45 Stat. 676) providing that employees of the Navy Department, the Naval Establishment, and the Coast Guard during the period of the

national emergency might receive vacation pay instead of annual leave, and the Act of August 1, 1941 (55 Stat. 616) granting the same privilege to Government employees ordered into the armed forces, Congress recognized the established administrative practice as to annual leave and amended the statute (49 Stat. 1161) only so far as the employees named were concerned.

Same; employee has no vested right to his office nor to annual leave.—An employee of the Government has no vested right to his office, and may be discharged at any time at the will of the sovereign, whether he is working at the time or is on leave (*Myers* v. *United States*, 272 U. S. 52), from which it follows that an employee has no vested right to the the leave to which he was entitled under the law in force at the time of his discharge.

Same.—Congress may take away from a Government employee the leave formerly granted him, which had accrued at the time of his discharge. See *Field* v. *Giegengack*, 73 Fed. (2d) 945.

Same; Emergency Relief Act of 1939.—Under the Emergency Relief Appropriation Act of 1939 (53 Stat. 927, 936) Congress fixed the amount of leave with pay to which an employee of the project on which plaintiff was engaged in a supervisory capacity should be entitled, permitting the payment of his salary for July, 1939, but not thereafter; and plaintiff having received all of the salary to which he was entitled under the provisions of the said Act is not entitled to recover more.

The Reporter's statement of the case:

Mr. S. W. Greenwald for the plaintiff.

Mr. Joseph M. Friedman, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

1. On January 15, 1936 plaintiff, William T. Butler, a theatrical mechanic, entered the employ of Federal Theatre Project No. 1, Official Project No. 765-3-4, Works Progress Administration of the United States, called Work Projects Administration from and after July 1, 1939. He was continuously employed on this project until July 31, 1939.

2. Plaintiff executed an oath of office upon beginning his employment with the project. During the entire period of his employment his salary was $155 a month, or $1,860 a year. During the entire period of his employment plaintiff occupied a supervisory position, being classified initially as senior supervisor over construction and subsequently as chief foreman.

3. Plaintiff's employment was terminated on July 31, 1939, at which time the project was closed down and liquidated by the Work Projects Administration in accordance with section 25 (a) of the Emergency Relief Appropriations Act of 1939 (53 Stat. 927, 936).

4. During his employment plaintiff was credited with two and one-sixth (2⅙) days of annual leave with pay for each month of service. At the time his employment was terminated, plaintiff had accumulated to his credit 70 days and 5 hours of annual leave. The money equivalent of this number of working days and hours, computed on the basis of $1,860 per annum, is $362. Between July 28 and July 31, 1939, one to three days before the project was terminated, plaintiff filed a written application with the Work Projects Administration for his accumulated annual leave with pay. This application was not granted, either by payment of a lump sum or by continuation of plaintiff's name on the pay roll of the Work Projects Administration after July 31, 1939.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit by a former employee of the Federal Theatre Project of the Works Progress Administration to collect an amount alleged to be due him as compensation for the annual leave to which he was entitled and which he never received.

He sues under the Act of March 14, 1936 (49 Stat. 1161), which reads in pertinent part as follows:

> * * * all civilian officers and employees of the United States wherever stationed and of the government of the District of Columbia, regardless of their tenure, in addition to any accrued leave, shall be entitled to twenty-six days' annual leave with pay each calendar year, exclusive of Sundays and holidays: *Provided*, That the part unused in any year shall be accumulated for succeeding years until it totals not exceeding sixty days. This Act shall not affect any sick leave to which employees are now or may hereafter be entitled. Temporary employees, except temporary employees engaged on construction work at hourly rates, shall be entitled to two and one-half

days' leave for each month of service. The annual leave herein authorized shall be granted at such times as the heads of the various departments and independent establishments may prescribe. This Act becomes effective January 1, 1936.

Plaintiff was employed on January 15, 1936 in a supervisory capacity, first as senior supervisor, and later as chief foreman. The Emergency Relief Appropriation Act of 1939 (53 Stat. 927, 936) provided for the closing down on June 30, 1939 of projects such as the one on which plaintiff was employed. Section 25 (a) thereof prohibited the use of funds made available by it for the operation of any theatre project after June 30, 1939, except that it permitted the payment of the salary for the month of July of a person working in a supervisory capacity "with or without assignment of duty incidental to the closing down of such project." Plaintiff was working in a supervisory capacity and he was paid his salary for this month. Just before the end of the month, on or after July 28, plaintiff made application for the annual leave to which he was entitled under the Act of March 14, 1936. This was 70 days and 5 hours. Since, under the above-mentioned act, it was necessary that his services be discontinued on July 31, 1939, and since thereafter he could not be carried as an employee, no annual leave was given to him, and none could have been given him except for a day or two.

He sues for the amount of pay he would have received during his leave if he had been granted it.

As this court held more than 50 years ago, annual leave is not a congressional device to increase an employee's pay, but is granted in the nature of a refresher, to afford surcease from an employee's labors for the common weal and to enable him to come back with fresh zeal to carry on in his country's service. As Judge Nott expressed it in *Harrison* v. *United States*, 26 C. Cls. 259, 269, annual leave was intended "to secure to the individual employé a vacation for refreshment and recuperation." It was never designed as a bonus upon separation from the service. Only an employee is entitled to it. After he ceases to be an employee, his right to it ceases. An employee may or may not receive it. He may not apply for it, but continue to work; if so, his right to it

is lost, except to the extent he is permitted to accumulate it. If he resigns before taking it, he loses his right to it. If he dies before receiving it, his estate is not entitled to collect the money value of it.

These statements are amply supported by authorities. See *Harrison* v. *United States, supra; Field* v. *Giegengack*, 73 F. (2d) 945 (C. C. A. for D. C.); 6 Dec. Comp. of Treas. 544; 8 Comp. Gen. 471; 12 Comp. Gen. 602; 13 Comp. Gen. 179; 17 Comp. Gen. 48.

It is true that when an employee is to be separated from the service, the date of his separation is often fixed far enough off to permit him to take the leave to which he is entitled before he is dropped from the pay roll, but the employee is not entitled to this as of right. *Harrison* v. *United States, supra; Field* v. *Giegengack, supra.*

If an employee is separated from the service before he has taken his leave, Congress did not intend that he should be paid the money equivalent thereof. Congress on June 28, 1940 (54 Stat. 676, 679), amended the Act of March 14, 1936 by adding a new section to read as follows:

> SEC. 8. Employees of the Navy Department and the Naval Establishment and of the Coast Guard may, during the period of the national emergency declared by the President on September 8, 1939, to exist, be employed during the time they would otherwise be on vacation without deprivation of their vacation pay for the time so worked. Employees who forego their vacations in accordance with the provisions of this section may be paid, in addition to their regular pay, the equivalent of the pay they would have drawn during the period of such vacation. The provisions of this section shall be applicable only to employees whose services at the time cannot, in the judgment of the Secretary of the Navy or the Secretary of the Treasury, as the case may be, be spared without detriment to the national defense.

The provision for a money equivalent for annual leave was made applicable only to the employees mentioned and not to employees generally.

On August 1, 1941 (55 Stat. 616), Congress gave the money equivalent to persons ordered into the armed forces. When

passing this Act Congress had before it the House Committee Report which quoted a letter from the Civil Service Commission, reading in part as follows:

> * * * There is no authority in law, however, to pay an employee in money for such leave as may be due him upon separation from the service (17 Comp. Gen. 48, July 16, 1937). In order that an employee may receive the benefits of accumulated and accrued leave prior to separation, therefore, the date of separation must be fixed at the expiration of such leave. Employees who are to be separated from the service, therefore, must be carried on the pay rolls of their respective departments or agencies as nominal employees until they have received salary for the period covered by the accumulated and accrued leave. The Comptroller General has held that once the effective date of an employee's resignation has passed there is no authority for restoring him to the pay roll for the purpose of granting him accumulated and accrued leave, even in cases where the failure to grant such leave was caused by administrative error or oversight.

Congress, then, having the established administrative practice before it, amended it only so far as were concerned employees entering the armed forces.

Plaintiff comes within neither of the above Acts.

In this case Congress by the Act of June 30, 1939, *supra*, fixed the amount of leave with pay to which a theatre project employee working in a supervisory capacity is entitled. This leave was for not more than the month of July. The Act permits payment of his salary for July "with or without assignment of duty," but prohibits its payment thereafter.

The last paragraph of this section (section 25 of the Act of June 30, 1939, *supra*) does not permit the payment of his salary for a longer time. It provides:

> This section shall not prohibit the payment of wages or salaries accrued, or of nonlabor obligations incurred, in connection with any such project if the wages or salaries accrued or the obligation was incurred prior to August 1, 1939, October 1, 1939, or September 1, 1939, as the case may be.

Under it only those salaries which accrued prior to August 1, 1939 are payable. The salary accrued to plaintiff prior to that time has been paid.

Salary during a leave accrues at the same time it would have accrued had the employee been working. It accrues and is payable at fifteen-day intervals. It is not payable in advance. If the employee dies before all the leave is taken, the salary stops *eo instante*. Therefore, the salary which would have accrued during any leave that had been granted plaintiff would have accrued after August 1, 1939.

It seems clear to us that Congress intended that this employee's salary should stop after July 31, 1939, and we also think it is clear that Congress had a right to do this. An employee has no vested right to his office. He may be discharged at any time at the will of the sovereign whether he is working at the time or is on leave. Even though appointed for a definite term, he may be discharged before that term is over. *Myers* v. *United States*, 272 U. S. 52. It would seem to follow from this that he has no vested right to the leave to which he was entitled under the law in force at the time of his discharge. We think that Congress may take away from him the leave formerly granted him and which had accrued at the time of his discharge. This was so decided by the Court of Appeals for the District of Columbia in *Field* v. *Giegengack*, *supra*, where there was involved the constitutionality of the Economy Act reducing the amount of an employee's annual leave.

The plaintiff has received all of the salary to which he was entitled under the Emergency Relief Appropriation Act of 1939, *supra*. He is entitled to no more. His petition will be dismissed. It is so ordered.

WHALEY, *Chief Justice*, and BOOTH, *Chief Justice* (retired), recalled, concur.

MADDEN, *Judge*, dissenting:

This case presents a problem of construing certain statutes and executive orders. I am unable to agree with the solution at which the majority opinion has arrived.

The statute upon which plaintiff bases his right to have annual leave with pay is the Act of March 14, 1936, which is quoted in the opinion of the Court. That act provided that persons such as plaintiff "shall be entitled to twenty-six

days' annual leave with pay for each calendar year," and that if such leave was not fully used in any year the unused part could be accumulated until it totaled not to exceed 60 days.

The Act of 1936 seems to me to have intended to confer upon Government employees a right frequently accorded by private employers to their employees, and which had, indeed, been granted by the Government to its employees for many years, except for the period from July 1, 1932, to April 1, 1933, when annual leave benefits were suspended under the Economy Act of 1932. The words of the 1936 Act, "shall be entitled to," seem to me to be apt only to express the idea that the employee is to have his pay, without working, for the specified period. I do not see how the Government could have more explicitly promised its employees this benefit than by saying what it did in this statute.

The opinion of the Court seems to take the view that this intention of the Government is qualified by the idea that one, to have his promised leave, must be an "employee," and that when he ceases to be an employee he forfeits his right, already earned, to be paid for a period without working. There is not a word in the statute indicating that the right is so qualified. Since the supposed qualification amounts, in effect, to a forfeiture of a valuable right already earned, I think it should not be read into the statute by implication. One would not think of reading an act fixing the salaries of employees to mean that one who ceases to be an employee, by resignation or discharge, disables himself from drawing pay earned while he was an employee.

The opinion of the Court suggests the view that the purpose of leave with pay is to provide for the employee a period of rest and refreshment, so that he may return and better serve the Government after his leave. No doubt this is one of the purposes of any employer who encourages his employees to take vacations without losing their pay, by giving them paid vacations. But to make this better service the *quid pro quo* for the employer's agreement to give leave with pay, so that the employee would not be really entitled to the pay for his leave period until he had returned and given the employer the benefit of his re-created energy for a sufficient period, would be a difficult bargain to spell out in a labor

agreement or a statute and, so far as I know, it has never before been read into such an arrangement by implication. The long-continued practice of the Government refutes the implication. The Departments have habitually given resigned employees or those discharged without prejudice their accumulated leave with pay, though they knew perfectly well that the refreshed employee was not going to give the Government the benefit of his vacation. I do not believe that the thousands of instances in which this has been knowingly done represent so many instances of maladministration by the agencies of the Government. To be sure, a certain formula has been followed. The employee has been advised to write his resignation to take effect, or he has been discharged, the discharge to take effect, at the end of his accrued leave. This has become the recognized custom of the Government offices. But this customary procedure has not been in the least inconsistent with the recognition that the employee had, during the time of his actual employment, earned something of value beyond the pay which he had already drawn, and which it would be wholly unfair to deny him just because he was ceasing to be an employee.

Section 7 of the Act of 1936 authorized the President to make regulations for the administration of the Act. Sections 6 and 7 of the President's regulations were as follows:

> Section 6. An employee voluntarily separated from the service without prejudice during any calendar year shall be entitled to accumulated leave plus current accrued leave up to the date of separation.
>
> Section 7. The date of a discharge of an employee who is involuntarily separated from the service other than for cause due to his own misconduct shall be fixed to permit the allowance of all accumulated leave and current accrued leave.

Section 6 was a complete recognition of the right of the employee to his pay for accrued leave though he was in fact separated from the service. It, like the customary department practice, was a negation of the idea expressed in the opinion of the Court that one earns his leave by his work after his vacation, rather than before. Section 7 was a direction as to the routine which should be followed in the case of

the discharge of an employee without prejudice. It did not affect the substantial right of the employee, and was in accord with the existing custom of the departments. It may be noted that the regulations give no direction as to how to handle the case of a resigned employee. Apparently the President did not regard the customary practice of having employees date their resignations to take effect at the end of their accrued leaves as being of any importance, one way or the other.

Against this background, we look at Section 25 of the Emergency Relief Appropriations Act of 1939, 53 Stat. 927, 936. This act forbade the use of the funds appropriated in it for the operation of any theater project after June 30, 1939, but provided that any supervisory employee on such a project could be paid his salary for July. Plaintiff was such a supervisory employee. Section 25 then provided:

> This section shall not prohibit the payment of wages or salaries accrued, or of nonlabor obligations incurred, in connection with any such project if the wages or salaries accrued or the obligation was incurred prior to August 1, 1939, October 1, 1939, or September 1, 1939, as the case may be.

The date August 1, 1939, given in this paragraph, is the one applicable to plaintiff, if the paragraph is applicable to his accrued leave.

I think this paragraph of Section 25 will easily bear the construction that Congress did not intend to forfeit plaintiff's accrued right to be paid for the period of his accrued leave. The right to be paid an additional amount for a period in which one does not work, is really a right to an additional wage or salary. I feel sure that for the purpose of a tax upon wages or salaries, it would be so interpreted. Otherwise there would be a period in each year for all Government employees and millions of other employees, when the employee would get his pay but no tax would be collectible on it. The very word "accrued," which is used in the leave Statute and Regulations is used in Section 25.

But if what plaintiff was "entitled to" under the leave statute was not "wages or salaries accrued," then it was a "nonlabor obligation incurred." I feel sure that Congress did

not intend to wind up the federal theater projects by a repudiation of some of the debts of the projects. I do not see how it could have expressed that honorable intention any more pointedly than by saying that both "wages or salaries accrued" and "nonlabor obligations incurred" should be paid. I think it left no opening for the forfeiture of any valuable right which another statute said plaintiff should "be entitled to."

By this easy construction I would avoid the more difficult task of determining whether Congress may, after one has worked for some two years under a statute which says he shall "be entitled to" certain pay, forfeit his right to the stipulated pay, not for the future, but for the period that he has already worked. See *Lynch* v. *United States*, 292 U. S. 571.

LITTLETON, *Judge*, concurs in the foregoing opinion.

WILLIAM SEKLECKI v. THE UNITED STATES

[No. 46033. Decided May 1, 1944]

On Defendant's Demurrer

Jurisdiction; suits by aliens limited by provisions of Title 28, section 261, U. S. Code.—The Court of Claims has no jurisdiction to entertain an alien's suit where there is no showing that the requirement of section 155 of the Judicial Code (28 U. S. Code 261) has been complied with, limiting suits by aliens to those "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts."

Mr. Harold H. Armstrong for the plaintiff.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff's petition alleges that he was indicted, and found guilty by a jury in a United States District Court, of violation of two subsections of the Federal Firearms Act, 52 Stat. ch. 850, p. 1250; 15 U. S. C. subsections 902 (f) and (i);

that he was imprisoned for a time in a county jail, and for a time in a United States penitentiary; that on plaintiff's appeal a United States Circuit Court of Appeals reversed his conviction on the ground that the provision of the Federal Firearms Act creating a presumption that a firearm found in the possession of a person who had been convicted of a crime of violence, had been shipped to that person in interstate commerce was unconstitutional, and that there was no evidence that the plaintiff had violated the Federal Firearms Act; that the plaintiff had been damaged by his imprisonment.

The plaintiff sues for damages for erroneous conviction and imprisonment under the act of May 24, 1938, 52 Stat. 438, 18 U. S. C. 729. The Government demurs to the petition.

In the plaintiff's petition appears the following statement:

> Plaintiff, not being a citizen of the United States, therefore under the rules of this court is not required to make an allegation that he has borne true allegiance to the Government of the United States.

Section 155 of the Judicial Code, 36 Stat. 1139, 28 U. S. C. 261, says:

> Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

The Government has made no point of the fact that the plaintiff is an alien. We have held, however, in the case of *Aktiebolaget Imo-Industri* v. *United States*, No. 45689 (decided April 3, 1944), that the plaintiff has the burden of showing that the requirement of section 155 is satisfied, and that, without such a showing, this court has no jurisdiction to entertain an alien's suit. We therefore, of our own motion, dismiss the plaintiff's petition.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

COATH & GOSS, INC., A CORPORATION, v. THE UNITED STATES

[No. 44042. Decided June 5, 1944]

On the Proofs

Government contract; delay; insufficient proof.—It is *held* that the evidence offered by plaintiff is not sufficient to show that defendant unreasonably delayed plaintiff under such circumstances or to such extent as to become liable for damages for breach of contract.

Same; acceptance of payment.—Where plaintiff accepted from defendant payment as full satisfaction of all expenses on account of delay incident to change in specifications, as a part of the equitable adjustment under the contract; plaintiff is precluded from recovery. *Seeds & Derham* v. *United States*, 92 C. Cls 97.

Same; insufficient proof.—Where, as to other items of delay charged to defendant, the proof fails to show the extent of the delay caused by the Government or that whatever delay the Government may have caused was unreasonable; plaintiff is not entitled to recover. *Union Engineering Co., Ltd.*, v. *United States*, 97 C. Cls. 424; *Magoba Construction Co., Inc.*, v. *United States*, 99 C. Cls. 662.

The Reporter's statement of the case:

Mr. Frederic N. Towers for plaintiff. *Frost, Myers & Towers* on the brief.

Mr. Philip Mechem, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff brought this suit to recover $12,872.82 as damages for alleged breach by defendant of a contract for construction of a post office building at Hamilton, Ohio.

Plaintiff claims that its performance of the work called for by the contract was unreasonably delayed by various defaults of the Government which increased the cost of the work in certain particulars. Delay in completion within the contract time occurred, but defendant denies that it is responsible as for a breach for any portion thereof.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of Illinois and is engaged in the general contracting business.

May 27, 1931, plaintiff entered into a written contract with the defendant whereby, for a consideration of $171,425, plaintiff agreed to furnish all labor and materials and perform all work required for the construction of a post office building at Hamilton, Ohio. The contract and specifications are in evidence as plaintiff's Exhibit 2, which is made a part hereof by reference.

2. The work was to be completed within 360 calendar days after date of receipt of notice to proceed. Notice to proceed was given on June 18, 1931, thereby fixing June 12, 1932, as the date of completion. Plaintiff began work on June 25, 1931, and the contract was completed on June 21, 1933, after a total elapsed time of 728 days. In connection with certain changes in the plans and specifications, which will be hereinafter referred to, defendant granted plaintiff extensions of time aggregating 380 days. No liquidated damages were deducted by the defendant.

3. Article 3 of the contract provided:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

4. July 29, 1931, plaintiff, while installing footings for the new building, received from the Acting Supervising Architect, who by Article 27 of the specifications was designated as the duly authorized representative of the contracting officer, the following telegram:

Revised drawings Hamilton Ohio Post Office affecting exterior southeast wall basement interior basement partitions boiler location carrier entrance mechanical equipment and first floor slab to be forwarded soon do no work which will interfere with the contemplated changes.

In compliance with the telegram plaintiff stopped work on the east wall of the building but continued on the other three walls as long as possible without interfering with the contemplated changes. August 26, 1931, plaintiff ceased work on the building, but it retained a small force at the site for approximately two weeks thereafter for the purpose of dismantling the runways, gathering up equipment, boarding sheds, and preparing the site for a shut-down.

Before work began plaintiff prepared a progress schedule to which it intended to adhere for completing the contract within the authorized time, and when work was suspended plaintiff had completed all operations called for by its progress schedule except those precluded by defendant's telegram.

5. October 7, 1931, defendant's construction engineer furnished plaintiff with the revised plans and specifications referred to in the telegram of July 29, 1931, and requested plaintiff to furnish its proposal for performing the work. October 26, 1931, plaintiff submitted its bid as requested but the amount thereof is not in evidence.

By November 21, 1931, plaintiff had not received approval of its proposal and on that date it wrote the Supervising Architect stating that it had been held up for 90 days and requesting that the matter be expedited.

Thereafter there were some negotiations between the parties regarding plaintiff's bid for the extra work, but the record does not disclose what transpired.

January 23, 1932, defendant wrote plaintiff that it was forwarding under separate cover new specifications and drawings for the proposed changes and requested that plaintiff submit its bid at the earliest practicable date. There is no satisfactory explanation in the record regarding this letter or the action taken by the parties thereon, but it does appear that plaintiff's proposal of October 26, 1931, was re-

jected and that no bid was submitted in response to defendant's request of January 23, 1932.

February 8, 1932, defendant issued revised specifications and drawings covering the contemplated changes, which included the freight elevator shaft, wire mesh partitions, wood block flooring, scale pit, parcel post chute, and other changes, and again requested plaintiff to submit its bid thereon.

February 25, 1932, plaintiff submitted to the Supervising Architect a written proposal to effect the changes for $20,878 and requested an extension of 240 calendar days for completion of the contract. At the foot of the bid appeared the following memorandum in the handwriting of plaintiff's president: "In addition to above, we request an additional payment of $2,100, which is one-half of the expense incurred by us by the delay of seven months on this job."

6. In August, 1931, Earl H. Lund, an engineer who was then employed as an estimator in the office of the Supervising Architect, Treasury Department, Washington, D. C., prepared a tentative estimate of the probable cost of the changes called for in the specifications furnished to plaintiff on October 6, 1931. About March 1, 1932, after the specifications were revised as of February 8, 1932, and after plaintiff had submitted its proposal of $20,878, plaintiff's president had a conference with Lund in Washington, D. C., where plaintiff's bid was discussed in detail. Lund informed plaintiff's president, Mr. Goss, that plaintiff's proposal of February 25, 1932, had been rejected and that the Government objected to the memorandum appearing at the foot of plaintiff's bid because it covered only one-half of the expenses claimed by plaintiff on account of the delay. Mr. Goss had the estimate used in computing plaintiff's proposal, and Lund agreed to check the figures in an effort to arrive at a mutually satisfactory amount which would cover everything in connection with the change, including expenses caused by the delay.

Prior to the conference, Lund had made up an estimate of the cost of the work called for by the revised specifications in the amount of $17,522, which included $2,285 as compensation to plaintiff for delay incident to the change.

After an addition of 10% for profit and 10% for overhead, his total estimate amounted to $21,201. The parties went over the figures in both estimates and arrived at an agreed amount of $22,500 as follows:

From Lund's figure of $17,522 there was first deducted $3,994 for the cost of certain work which defendant had decided to omit and which was not included in plaintiff's bid of February 25, 1933. Then $2,809 was added for increases requested by plaintiff on three items. After an allowance of 10% for profit and 10% for overhead, a figure of $19,767 was obtained, to which Lund then added the $2,100 which plaintiff had claimed as one-half of its cost due to the delay. To the resulting figure of $21,867 there was also added $633 for an unexplained item, making the total $22,500, which, as shown, included $4,385 to compensate plaintiff for expenses incurred on account of the delay incident to the change.

Pursuant to the agreement made between plaintiff's president and Lund, plaintiff submitted its amended proposal of $22,500 on March 2, 1932, and again asked for 240 days' extension of time.

March 5, 1932, the proposal was accepted by the Assistant Secretary of the Treasury, and the time for completing the contract was extended for the period requested. Although the letter of approval did not so state, 210 days of the extension granted was for the delay and 30 days was for the performance of the additional work required by the change in plans.

7. Plaintiff received the drawings covering the change on March 14, 1932. March 17 and March 23, 1932, plaintiff requested additional copies of the drawings and specifications for the use of its subcontractors, but defendant did not promptly supply the additional copies. As a result, plaintiff was delayed in making the necessary arrangements with its subcontractors and did not resume work until April 3, 1932, 221 days after work was suspended.

8. On account of the delay caused by the change in the plans and specifications which has been described in the preceding findings, plaintiff claims the following:

(1) Fair rental value of idle equipment	$3,258.75
(2) Labor for closing down job after shut-down	139.16
(3) Labor for opening up job after shut-down	375.00
(4) Telephone service during shut-down	43.10
(5) Progress photographs during shut-down	46.50
(6) Office overhead allocable to job for 248 days, the period of delay claimed by plaintiff as a result of the change	4,362.32
Total	$8,224.83

No finding is made with respect to plaintiff's claims for the reason, as stated in finding 6, that plaintiff agreed to accept $4,385 of the $22,500 paid by defendant for the changes in the building as full compensation for all expenses which plaintiff claimed on account of the delay.

9. April 16, 1932, the defendant requested plaintiff to submit proposals on two items, the first for installation of strip wood block flooring in certain rooms and the second for placing of unit wood block flooring in certain other rooms. May 18, 1932, plaintiff made bids of $2,369 on Item No. 1 and $756 on Item No. 2. By telegram of July 27, 1932, defendant rejected plaintiff's proposal on Item No. 1 and stated that in view of the provisions of the Economy Act it would be necessary to obtain the President's approval of the proposal on Item No. 2.

10. May 2, 1932, defendant requested proposals from plaintiff for making changes in the building including (1) finishing the lobby to the basement stairs with slate instead of cement and (2) altering the stair hall, public lobby, parcel post screen and counter, look-out gallery, and toilet room.

June 1, 1932, plaintiff submitted the requested proposal, which was not accepted by defendant, and on June 24, 1932, plaintiff made a revised proposal in the amount of $13,350.

With reference to the revised proposal, plaintiff wrote the Supervising Architect on August 15, 1932, in part as follows:

> On June 24th we submitted to you our proposal covering certain changes in the basement of the above project. On July 11th we received a telegram from you advising us that this proposal must obtain the President's approval, and that the bid was then under consideration.
>
> To date we have heard nothing further from you on this matter and we wish to go on record this date as

requesting additional time for completion. Unless we receive definite instructions by Monday, August 22nd, 1932, we shall have to either stop operations altogether, or proceed with the work as now under contract. In any event, we shall require additional time from August 22nd until such time as we are advised as to the procedure to follow.

11. On August 16, 1932, the contracting officer telegraphed plaintiff that its proposal of June 24, 1932, had been approved on the basis of cost plus ten percent for overhead and ten percent for profit, not to exceed plaintiff's bid of $13,350.

The telegram also stated that Item No. 2 of plaintiff's proposal of May 18, 1932, relative to the unit wood block flooring had been accepted.

12. August 29, 1932, plaintiff wrote the Supervising Architect for permission to subcontract the additional work called for by the proposal of June 24, 1932. Plaintiff's letter stated that its bid was so low that it would be unable to perform the work for that amount unless its request was granted.

September 30, 1932, after a delay of 30 days, the Supervising Architect authorized plaintiff to subcontract the work as requested.

Plaintiff was unable to contract for the additional work covered by its proposal of June 24, 1932, with the subcontractors who were constructing the major portion of the building. Accordingly, on November 18, 1932, plaintiff wrote the Supervising Architect as follows:

> We have gone into the matter very thoroughly, and in order to do the work and still come within the stipulated price, we have been obliged to sublet various trades to firms other than those who have the subcontract for the major portion of the building. This, naturally, means that these contractors cannot do their work until after the regular contractors have finished, which, you can see, will cause considerable delay in completing the building.
>
> The new work is so closely interrelated with existing contract requirements that we can see no other way to handle the situation, and this naturally has placed us in a very embarrassing position because of the fact that we must finish the building with one set of contractors and then start out again with another set to do the additional work in the basement.

For this reason we are asking that you grant us forty-five days' additional time, and trust that your favorable action will be forthcoming.

December 30, 1932, the Supervising Architect wrote plaintiff that since the extent of the delay could not then be determined, plaintiff should submit a statement as to the definite number of days it was delayed at the same time it forwarded an itemization of the cost of the completed work.

June 6, 1933, plaintiff submitted its completed proposal and itemization of the cost of the changes covered by its proposal of June 24, 1932, and requested that the contract be extended for 140 days on account of the delay occasioned by such changes.

June 24, 1933, the Assistant Secretary of the Treasury approved the proposal and statement of cost and advised plaintiff as follows:

> It is noted that you state you were delayed a total of 140 days on account of this extra and the Engineer states that this is an equitable adjustment of compensating time for the delay caused you, due note of which will be made at time of final settlement.

The time for completing the contract was extended for the 140 days requested by plaintiff, of which a period of 100 days was allowed for delay incident to the change and 40 days allotted for the time required in performing the additional work.

13. The time consumed by the Government in acting on plaintiff's proposal of May 18, 1932, covering the strip wood block flooring and unit wood block flooring delayed installation of the flooring material for a period of two weeks, because plaintiff's subcontractor who manufactured the flooring was unable to begin work in the factory until the proposal was approved in part on August 16, 1932.

However, it does not appear how much the job as a whole was affected by this delay and there is no proof that plaintiff incurred any additional expense or sustained a loss by reason thereof.

14. On account of the delay resulting from the change covered by plaintiff's proposal of June 24, 1932, and for which the contract was extended 140 days, plaintiff claims

$2,722.79. The claim is for job overhead and workmen's compensation insurance for 12½ weeks or 88 days, but proof is lacking as to what period or periods of time plaintiff used as a basis for arriving at the total of 88 days.

In addition to the time consumed by the Government in acting on plaintiff's proposal, the work was delayed in part by the difficulties plaintiff encountered in undertaking to subcontract the work called for in its proposal, and in part by plaintiff's failure to have materials on hand when needed. There is no satisfactory proof of the number of days, if any, defendant unreasonably delayed plaintiff in making changes in the building upon which this claim is based.

The contracting officer made no findings of fact with respect to the cause of this delay or of any other of the delays involved in this action.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The evidence offered by plaintiff is not sufficient to show that defendant unreasonably delayed it under such circumstances or to such extent as to become liable for damages for breach of the contract (see findings 6, 7, 9, 13, and 14). As to the principal item of alleged unreasonable delay, the Government paid plaintiff $4,385 as a part of the equitable adjustment under Article 3, which plaintiff accepted in full satisfaction of all expenses on account of the delay incident to the change. *Seeds & Derham* v. *United States*, 92 C. Cls. 97. As to other items of delay charged to defendant, the proof fails to show the extent of delay caused by the Government or that whatever delay it might have caused was unreasonable. *Union Engineering Co., Ltd.* v. *United States*, 97 C. Cls. 424; *Magoba Construction Co., Inc.* v. *United States*, 99 C. Cls. 662.

Plaintiff is not entitled to recover, and the petition must be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRAZIER-DAVIS CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 44341. Decided June 5, 1944]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act; effect of the Act of June 25, 1938.—The broad language of the Act of June 25, 1938 (52 Stat. 1197), together with its legislative history, shows that it was the intention of Congress to reopen settlements theretofore made, either by the Comptroller General or by any authority pursuant to private relief bills, for increased labor costs as a result of the enactment of the National Industrial Recovery Administration Act.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the evidence and a stipulation of the parties:

1. Plaintiff at all times hereinafter referred to was and for all purposes here material is now a corporation organized and existing under the laws of the State of Missouri, with its principal place of business at St. Louis, Mo.

2. January 19, 1933 plaintiff entered into a contract with the War Department through the District Engineer, United States Engineer Office, Louisville, Kentucky, for the construction of Lock and Dam No. 5, Green River, Nakar, Kentucky. The amount of the contract as increased by change orders was $760,241.68. Work under the contract was commenced February 10, 1933, and was completed September 19, 1934.

3. July 27, 1933 plaintiff signed the President's Reemployment Agreement entered into pursuant to the National Industrial Recovery Act. Theretofore, on July 7, 1933 plaintiff had entered into a proposed supplemental agreement with the Contracting Officer. This supplemental agreement contained a provision to the effect that it was

subject to the approval of the Chief of Engineers, United States Army. The proposed agreement provided for the payment of a minimum wage of 35¢ per hour, and for certain wage increases to employees receiving in excess of 35¢ per hour, and for the billing of the Government by the contractor for the amount of the wage increases provided in the agreement.

4. By letter dated October 10, 1933 plaintiff was advised by the Contracting Officer that the agreement would not be approved. Theretofore, on August 17, 1933, plaintiff had made adjustments in the wages of its employees to conform with the wage increases required by the proposed supplemental agreement. As a result, plaintiff incurred increased labor and employees' compensation insurance costs of $33,-595.52. Plaintiff was paid the sum of $25,144.76 pursuant to Private Act No. 261, Seventy-fifth Congress, Chapter 561, 1st session, approved August 3, 1937 (50 Stat. 1043). Plaintiff by this action claims the difference of $8,450.76.

Plaintiff has abandoned all other claims heretofore asserted by it for increased costs incurred as a result of the enactment of the National Industrial Recovery Act in the performance of the contract, and agrees that its claim in respect thereof shall be limited to the sum of $8,450.76.

5. Plaintiff's claim for increased costs in performing the aforementioned contract was duly presented to the War Department on January 28, 1935 in accordance with the Act of June 16, 1934 (41 U. S. Code, Secs. 28–33), within the limitation period provided in section 4 of that Act. Thereafter, that claim was transmitted by the War Department to the Comptroller General of the United States, who disallowed it. As set forth in finding 4, plaintiff, pursuant to the Private Act approved August 3, 1937, was paid on its claim the sum of $25,144.76. The Private Act reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the Frazier-Davis Construction Company, of Saint Louis, Missouri, the sum of $25,144.76 in full settlement

of the claim of said company against the United States for increased cost of labor and material incurred in complying on and after August 10, 1933, with the President's Reemployment Agreement and/or the applicable approved code in the performance of its contract with the War Department dated January 19, 1933, for the construction of lock and dam numbered 5, Green River, Kentucky: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

Approved, August 3, 1937.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The findings of fact show that the plaintiff, in the performance of a contract with the Government, incurred increased costs of $33,595.52 as a result of the enactment of the National Industrial Recovery Act. It has, therefore, a valid claim for that amount under the act of June 25, 1938, except as its claim is affected by the following intervening events. It having, in 1935, timely presented its claim for $33,595.52 to the War Department under the act of June 16, 1934, and the Department having transmitted the claim to the Comptroller General, that official denied the claim. Then the plaintiff sought and obtained the enactment of the Private Act recited in finding 5, appropriating $25,144.76 to the plaintiff "in full settlement of the claim of said company against the United States for increased cost * * * incurred in complying" with the National Industrial Recovery Act. The Private Act was approved August 3, 1937, and the plaintiff was in due course paid the money appropriated by it.

The question is whether the act of June 25, 1938, gave to the plaintiff the right to recover the balance of its increased costs, notwithstanding the release of that balance which was implied in its acceptance of the money appropriated to it in the Private Act. We think it did. Section 3 of the 1938 act provides that we shall adjudicate claims under it "upon

a fair and equitable basis, and notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made." In the Senate Report on the bill which became the act of June 25, 1938 (Senate Report No. 1996, 75th Congress, Third Session), there is quoted a letter from the Secretary of War to the Chairman of the Senate Committee on Claims, which letter says:

> The present bill would also in effect reopen to possible judicial review in the Court of Claims, at the suit of claimants, all settlements and adjustments of such claims already made, either by the Comptroller General under the act of June 16, 1934, or by any authority pursuant to private relief bills.

We think that the broad language of the 1938 act, together with its legislative history, shows that Congress intended to reopen settlements such as the one involved here. We therefore award the plaintiff $8,450.76, the unpaid balance of its increased costs.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

BRAND INVESTMENT COMPANY (formerly known as A. W. KUTSCHE & COMPANY) v. THE UNITED STATES.

[No. 44432. Decided June 5, 1944]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act; insufficient proof.—It is *held* that the evidence submitted by plaintiff fails to establish that it incurred increased labor costs in the performance of its contract as a result of the enactment of the National Industrial Recovery Administration Act.

The Reporter's statement of the case:

Mr. Max Freedman for plaintiff.

Mr. W. A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff brought this suit under an act of June 28, 1938, to recover $66,964.89, increased costs and loss alleged to have been incurred in the performance of a construction contract with defendant as a result of the enactment of the National Industrial Recovery Act.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Michigan corporation, having been duly incorporated in that State in 1920 under the name of A. W. Kutsche & Co., under which it continued until November 28, 1938, at which time its name was changed to Brand Investment Company. Plaintiff at all times hereinafter mentioned was engaged in the general contracting business with its principal place of business in Detroit.

2. December 10, 1932, plaintiff and defendant entered into a contract for the construction of a Post Office Building at New Castle, Pennsylvania, for the sum of $209,500. Paragraph 11 of the specifications, which was a part of the contract, provided in part as follows:

> *Rate of Wage.*—The following paragraph pertaining to the rate of wage shall apply to every contract in excess of $5,000 in amount:
>
> A. The rate of wage for all laborers and mechanics employed by the contractor or any subcontractor, on the public building covered by the contract, shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public building is located. In case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination, and his decision thereon shall be conclusive on all parties to the contract, as provided in the Act of March 3, 1931.

Notice to proceed was given January 16, 1933. By telegram of the same date plaintiff advised the defendant that it would start operations March 1, 1933. Plaintiff actually commenced demolition work during January 1933.

3. Plaintiff fixed rates of pay for carpenters and common labor during the early part of the contract work, the rate for carpenters being fixed at 75¢ an hour, while common

labor received 35¢ an hour. March 23, 1933, these rates were posted at the site of the work. At that time there was a great deal of unemployment and plaintiff found no difficulty in obtaining such labor as it needed.

March 23, 1933, plaintiff wrote to John T. Jackson, Jr., Construction Engineer, as follows:

Re New Castle, Pa., Post Office

In reply to your letter of March 23rd, please be advised that we will immediately post in a readily accessible place the rates of wages for all classes of labor engaged at the present time in the construction of the New Castle, Pa., Post Office. As other trades appear on the above project, we will immediately add to this list the rates to be paid to such trades. At the present time there are but two classes of labor being employed—that is, common labor, excavating for footings; and carpenters, building forms. The following rates will be posted today:

Common Labor	35¢ per hour
Carpenters	75¢ per hour

We believe that this procedure is entirely in accordance with the General Specification and that these rates are higher than the prevailing rate of wage for work of a similar nature being erected in the New Castle, Pa., district. We are prepared to present evidence as to the veracity of the above statement and trust that this method of procedure will meet with your approval in connection with the labor on this project.

There is no satisfactory proof that the rates so fixed were formally agreed upon as the prevailing rates of pay, but the workmen began work on the project at the rates indicated.

4. During January 1933 a controversy appears to have existed between plaintiff and its workmen concerning wages to be paid on the project. January 23, the Director of Conciliation sent Commissioner Emmiline Pitt to New Castle to make an investigation and endeavor to settle the dispute. Later, Commissioner Thomas Finn was also sent. They found, among other differences, a controversy between plaintiff and the carpenters and common labor which had culminated in a strike then being carried on. This was in April 1933. Carpenters were claiming 90¢ an hour and common labor 40¢ an hour. The conciliators made an extensive investiga-

tion of rates paid in the New Castle area and determined that the prevailing rates were 90¢ an hour for carpenters and 40¢ an hour for common labor, and so reported to the Director of Conciliation. Reports were made by the conciliators May 1 and July 21, 1933.

The conciliators succeeded in having carpenters and laborers return to work on plaintiff's project at the old rate of 75¢ for carpenters and 40¢ for common labor, pending adjustment by the Department of Labor. They also conferred with representatives of plaintiff and endeavored to obtain an agreement from plaintiff to pay 90¢ and 40¢ an hour, respectively, to carpenters and laborers, advising plaintiff that these were the prevailing rates. Plaintiff refused, contending that 75¢ and 35¢ were the prevailing rates.

5. Plaintiff proceeded with the work on the project, and on June 16, 1933, the NIRA became effective. However, since the hours and wages being paid by plaintiff met the minimum requirements of the Act, the workmen on plaintiff's project were not affected thereby, so that plaintiff was not required to and did not reduce the number of hours or increase the rates of pay by reason of the NIRA.

6. July 8, 1933, L. W. Robert, Assistant Secretary of the Treasury, wrote the following letter to W. P. Calahan, Secretary of the Building Trades Association, New Castle, Pa.:

> With reference to your letter June 16, requesting to be advised of the correct rates for the common labor and carpenter trades in connection with the construction of the New Castle, Pa., Post Office building, you are advised that the contractors agreed with a representative of the Department of Labor to pay common laborers 35¢ per hour and carpenters 75¢ per hour.

July 11, 1933, the carpenters and common laborers on plaintiff's project went out on strike due to failure in the adjustment of wages to 90¢ an hour for carpenters and 40¢ an hour for common labor.

7. The Department of Labor's Commissioner of Conciliation filed a report with the Secretary of Labor dated July 25, 1933, in which it was stated that the prevailing wage rate for common labor was 40¢ an hour and for carpenters 90¢ an hour. The Secretary of Labor determined that the pre-

vailing rate of wages in connection with plaintiff's contract was 40¢ an hour for common labor and 90¢ an hour for carpenters, and on July 25, 1933, notified the Secretary of the Treasury of such finding in a letter which reads as follows:

> Reference is made to the dispute which arose as to the prevailing rate of wages to be paid in the construction of the Post Office building at New Castle, Pennsylvania, and to your request that the rates for Carpenters and Common Laborers be determined by this Department.
>
> A careful investigation of the rates prevailing in New Castle has been made by a representative of this Department, and a satisfactory adjustment of all rates except those for Carpenters and Common Laborers was reached through conciliation.
>
> The A. W. Kutsche Company, the general contractor, maintains that the prevailing rate for Common Laborers in New Castle is thirty-five cents (35¢) per hour. The Laborers contend that the proper rate is forty (40¢) cents per hour. The investigation by this Department disclosed the following facts:
>
> The Superintendent for the State Highway Department for the New Castle district of Pennsylvania pays Laborers engaged on highway work a rate of forty cents (40¢) per hour. A total of 1,497 have been employed on highway work at the above rate. This rate is also being paid by the following named companies in this district: The American Sheet and Tin Plate Co.; The Blair Strip Steel Co.; Mason & Hylan, contractors; Levio Stone Mason Co.; New Castle Water Co.; these companies employing more than 400 laborers. The Manufacturers Light & Heat Company, a Public Service Corporation, pays its laborers forty-two (42¢) cents per hour. The Pennsylvania and the Baltimore & Ohio Railroads pay its laborers rates ranging from thirty-six and nine-tenths (36.9¢) cents to thirty-eight and seven-tenths (38.7¢) cents per hour, depending upon length of service.
>
> There is no building under construction in New Castle except the Post Office project at this time, hence the rate for Common Laborers must be determined from other activities. No evidence was submitted in support of a thirty-five (35¢) cent rate. The State of Pennsylvania and the largest industries in this district are paying laborers forty (40¢) cents per hour. There seems to be no question about this being the prevailing rate, and I so decide.

The general contractor contends for a rate of seventy-five (75¢) cents per hour for Carpenters. The latter maintain that the prevailing rate is ninety (90¢) cents per hour. The investigation disclosed the following facts:

Previous to July 1, 1932, the rate paid to the great majority of Carpenters in the City of New Castle was one dollar and twenty-five ($1.25) per hour. On that date, however, the members of the local union voted to reduce their rate to ninety (90¢) cents per hour. This reduction was taken for the purpose of stimulating building operations, repair work, etc., and was the lowest rate paid to members of this craft since the year 1915. This rate is still in effect. It is certified to in an agreement entered into between the Carpenters' local union of New Castle and the following contractors of that city: Eckles & Caruthers, Harvey S. Zeigler, A. W. Bauman, A. N. Bergland, Nicholas Frasso, J. M. McCandless; L. A. Haug, J. R. McBride, and M. Dale Andrews. Four of these contractors, namely, Haug, Eckles & Caruthers, J. N. McCandless, and A. W. Bauman, are capable of handling large contracts and normally build about seventy-five percent of the projects in the city.

There is not a single building operation in the City of New Castle under way at this time, neither has there been one for three years which compares with the Post Office project and which can be considered "work of a similar nature." In the past, when large operations were under way, the carpenters' union scale has been paid. Among these operations may be mentioned the following: First National Bank, a $200,000 project; Lawrence Savings & Trust Co., a $200,000 project; Castleton Hotel, a $100,000 project; Jameson Memorial Hospital, a $200,000 project; Masonic Cathedral, a $200,000 project; Old Main Memorial, Westminster College, a $250,000 project; Brown Hall, Westminster College, a $50,000 project; George Washington School, a $350,000 project.

The evidence shows conclusively that the rate for Carpenters in New Castle, Pa., in the past and at present, is the rate which has been mutually agreed upon between local No. 206, Brotherhood of Carpenters and Joiners of America, and representative contractors of that city.

It is my decision that the rate for Carpenters on the Post Office Building at New Castle, Pa., is ninety (90¢) cents per hour.

8. August 4, 1933, plaintiff received the following telegram from L. W. Robert, Assistant Secretary of the Treasury:

Re your contract construction New Castle, Pennsylvania, Post Office: Secretary Labor states prevailing wage rate carpenters ninety cents and common laborers forty cents per hour. Demand hereby made you take necessary steps to pay same from this date. Letter follows.

Also on the same date Mr. Robert wrote plaintiff confirming the telegram quoted above, and stated further:

> Your failure to comply with the provision to pay the prevailing rate of wages constitutes a breach of your contract, and it is requested that you inform the Department immediately what steps shall have been taken by you to comply with the terms of your contract and the law in this particular.

Plaintiff replied to this under date of August 7, as follows:

> This will acknowledge your telegram dated August 4, 1933, as follows: * * *
>
> Please be advised we are pleased to comply with your instructions. The strike is over and the men are resuming work this morning, August 7th.

The application of the prevailing wage rates as determined was not made retroactive.

9. The workmen who went out on strike July 11, 1933, returned to work on or about August 4, 1933, and were paid the increased wages of 40¢ an hour for common labor and 90¢ an hour for carpenters, beginning August 4, 1933.

10. Prior to the raising of carpenters' wages some carpenters worked more than 40 hours a week, and thereafter some carpenters still worked more than 40 hours a week. By reason of raising carpenters and common laborers to the prevailing rates of wages as provided in the contract, plaintiff's costs were increased $1,984.60. No part of said increase in costs was the result of the enactment of the NIRA.

11. While the strike of July 11, 1933, was in progress, plaintiff wrote to defendant's Construction Engineer on July 21, 1933, asking that a conciliator from the Department of Labor be sent to adjust the strike. July 25, 1933, this letter reached the Secretary of the Treasury, who referred the matter to the Secretary of Labor for investigation.

The Assistant Secretary of the Treasury on July 25, 1933, advised plaintiff that Conciliator Finn had recommended to

the Department of Labor the disputed carpenter and laborer wage rate and that that department's decision, which was being awaited, would be conclusive on all parties.

12. Under date of September 6, 1933, plaintiff wrote to the Supervising Architect, Treasury Department, as follows:

> On date of July 11th, without warning, the laborers and carpenters went out on strike, due to a wage dispute of long standing. Hoisting Engineers, Electricians, Steelworkers, and cetera, also refused to work, on the basis of a sympathetic strike with the carpenters and laborers. This strike was precipitated by the receipt of a letter addressed to the Building Trades of New Castle, signed by L. W. Robert, Ass't Secretary, stating that it was his understanding that the wage dispute here had been settled at rates which were lower than those asked by the men on strike. A previous strike started April 25th, due to the same wage dispute, at which time the Department of Labor sent Miss Emmiline Pitt and Mr. Thomas Finn to conciliate this matter. Efforts by the conciliators to adjust the wage differences failed. However, in due time, the men returned to work at the same wage as they were receiving when they went on strike.
>
> The Contractor assumed that this signified willingness on their part to accept the wage rates being paid by the Contractor. No labor trouble occurred until July 11th, when a strike occurred. The Union leaders stated that, since the strike in April, they were working under the premise that the Department of Labor was in the process of establishing the wages and they inferred that the Department of Labor conciliators had assured them that they would see that the rates were fixed at the rate asked for. Not having gotten action in this matter, the Union wrote to the Treasury Department and received the aforesaid letter from the Treasury Department that precipitated the strike of July 11th.
>
> Mr. Thomas Finn attempted to conciliate this strike and, being unsuccessful with the Union carpenters, he stated that the procedure would be to have the rate set by the Department of Labor. During this process, he asked the Union men to return to work. They refused, as they feared that, by returning to work as they had in April, that the Department of Labor would not take action in their case. Consequently, the Union men did not return until the rates were fixed by the Department of Labor, on date of August 8th. The laborers returned

previous to that date on an agreement that the Contractor would pay the difference if a higher rate was set.

We respectfully request that an extension of 28 days on our contract be granted, the time that the affiliated Union men were on strike, and we believe that this strike of July 11th was caused by promises make [made] in April by the Department of Labor representatives, which, when they did not materialize, caused the Union men to strike on July 11th.

The proof fails to show that the rate of wages ordered by the Secretary of the Treasury to be paid was increased because of the enactment of NIRA. Plaintiff makes no claim that the wage rates of mechanics in other trades were increased after the enactment of the NIRA.

13. Plaintiff claims losses also from "labor overrun" in connection with this project for two periods: (a) June 16 to November 1, 1933; (b) February 21, 1934, to completion of the project.

"Labor overrun" is the term applied by plaintiff signifying a higher actual expenditure for labor in performing a particular piece of work than plaintiff originally estimated that it would cost.

14. October 31, 1933, the defendant issued a stop-work order to the plaintiff, the effect of which was to suspend all building operations under the contract until February 21, 1934, on or about which date the stop-work order was terminated by defendant and operations on the building were resumed by plaintiff.

The losses occasioned by said stop-work order are the subject of another petition by the plaintiff herein, being No. 44617.

15. On or about October 31, 1933, plaintiff, who had subcontracted with the Hoyland & Mercer Company for its brick and tile work, became dissatisfied with the conduct of the subcontractor, claiming that the subcontractor had failed to pay wages in accordance with its contract, and took over the work from the subcontractor and completed it.

Plaintiff suffered a loss on this contract of increased costs, including the sum of $122.88, which represents an increase of 5¢ an hour, beginning the week ending August 4, 1933.

16. Plaintiff had also subcontracted for having its electrical work done by the Meyer Light Company. On or about June 15, 1934, that concern discontinued its work and plaintiff assumed and completed the electrical work. This contract was finished at a loss, as plaintiff claims, of $2,581.62. This was prior to the effective date of the NIRA.

17. Plaintiff also had subcontracted its labor work in connection with placing reinforcing steel with Harry Finnie, for a price of $6 a ton for furnishing labor and placing the reinforcing steel on plaintiff's project. In connection with this subcontract, plaintiff, under date of July 7, 1933, wrote Harry Finnie the following letter:

> In connection with our conversation yesterday, in which you stated that you do not feel able to continue with your contract here for the placing of the reinforcing steel, please be advised that, if you have not changed your mind in this matter, we request that you write us a letter, stating that you are unable to proceed and give your reasons and also request that we furnish you with a statement of your account. This should be done at the earliest possible moment. Either write this letter immediately or report here Wednesday, July 12th, for the purpose of installing the reinforcing steel in the retaining wall along Market Street.

18. Plaintiff suffered losses in connection with its subcontract with the Pennsylvania Sand Stone Company, which appears to have become financially involved so that plaintiff completed this work itself. However, the proof shows that in carrying out this work it had difficulty with the sandstone and had to quarry more than was actually necessary. This loss is not attributable to the NIRA.

19. Plaintiff had subcontracted with Henderson and Johnson to furnish labor and material to complete the lathing and plastering work on the project in accordance with the progress schedule, which stated that such work must be completed not later than November 1, 1933. Henderson and Johnson abandoned the work, and plaintiff readvertised and again subcontracted the work to Surridge & Co. under date of August 2, 1933.

The proof indicates that plaintiff was running behind in its progress schedule by approximately a month on November 1, 1933, the date fixed for completion of the work by

Henderson and Johnson. The proof fails to show whether the work was abandoned by Henderson and Johnson on account of increased wages and costs for material, or because it could not perform the work in the time it contracted for.

Plaintiff suffered a loss of approximately $1,662.38 in connection with this transaction.

20. Plaintiff, in preparing its bid for the contract work, estimated that its total labor costs, exclusive of work subcontracted, would amount to $12,192.06.

21. From the beginning of the contract work plaintiff had a substantial increase in its "labor overrun" which by June 16, 1933, prior to enactment of the NIRA was 66%. This 66% overrun reflects an error in underestimating the labor cost for the project. Plaintiff had not worked at New Castle prior to this time, was unfamiliar with conditions there, and found that its labor failed to produce in accordance with its expectation.

Plaintiff, in seeking to establish its increased cost after June 16, 1933, simply shows its actual costs and the amount it received from the defendant under the terms of the contract, and claims that the difference between said amounts resulted from the NIRA.

22. The proof fails to show that plaintiff's losses in connection with the work taken over from subcontractors were the result of the NIRA or were caused by the stop order referred to in finding 14. Plaintiff had a controversy with its workmen regarding wage rates almost from the beginning of work on the project; strikes occurred, and adverse job conditions caused losses. Plaintiff was unable to present proof to show that any particular portion of its losses was due to the NIRA, or to the stop order, or to plaintiff's error in underestimating its labor cost on the project.

There is no competent proof that plaintiff's costs were increased by the NIRA.

The court decided that the plaintiff was not entitled to recover, in an opinion *per curiam*, as follows:

The evidence submitted by plaintiff fails to establish that it incurred increased labor costs in the performance of its contract as a result of the enactment of the National Industrial Recovery Act. The petition must therefore be dismissed. It is so ordered.

BURGESS BATTERY COMPANY v. THE UNITED STATES

[No. 44695. Decided June 5, 1944]

On the Proofs

Patent for sound-deadening construction; validity; anticipation.—It is *held* that the Norris patent, #1,726,500 on sound-deadening construction is invalid for lack of novelty, having been anticipated by the British patent to Stevens, #4,843, of 1887, and by "The Dynamical Theory of Sound," published in 1925 by Horace Lamb.

Same; foreign patent anticipation.—That the patent in which prior disclosure appeared is a foreign patent is immaterial under section 31 of Title 35, United States Code. *In re Cross*, 62 Fed. (2d), 182; *Becket* v. *Coe*, 98 Fed. (2d), 332.

Same; prior publication.—The only feature of the Norris patent in suit which differs from prior patents had been anticipated by the Lamb publication. See *Freyn Engineering Co.* v. *Coe*, 79 Fed. (2d), 134.

Same; case in U. S. District Court distinguished.—The case of *Burgess Laboratories, Inc.*, v. *Coast Insulating Corp.*, 27 Fed. Supp. 956, in which the U. S. District Court held claim 4 of the Norris patent valid, is distinguished for the reason that the Stevens patent and the Lamb publication were apparently not relied on in that case.

The Reporter's statement of the case:

Mr. Daniel V. Mahoney for the plaintiff. *Pennie, Davis, Marvin & Edmonds* were on the briefs.

Mr. T. H. Brown, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. C. P. Goepel* was on the brief.

The court made special findings of fact as follows:

1. On August 27, 1929, United States letters patent, No. 1,726,500, were issued on an application filed in the patent office by Ralph Forbush Norris on February 25, 1929. This application was a continuation of a prior application filed by Norris on August 11, 1927. It covered sound-deadening construction.

2. The Norris patent 1,726,500 when granted was issued to C. F. Burgess Laboratories, Inc., of Madison, Wisconsin, as assignee of Ralph Forbush Norris prior to issue.

On August 31, 1938, C. F. Burgess Laboratories, Inc., executed an instrument assigning the patent in suit to Burgess Battery Company, a Wisconsin corporation, together with the right to recover for past infringement.

The Burgess Battery Company, of Delaware, is a corporation resulting from a reorganization of the Burgess Battery Company, a Wisconsin corporation. As a part of the plan of reorganization the patent issued to C. F. Burgess Laboratories, Inc., was assigned to the plaintiff by the Wisconsin corporation, together with the right to recover for past infringement.

3. Sound-deadening devices constructed in accordance with the patent in suit were placed on sale by plaintiff's predecessor in 1927. In 1929 plaintiff's predecessor, C. F. Burgess Laboratories, Inc., discontinued the manufacture of the product covered by the patent and granted a license to the Johns-Manville Corporation under certain inventions which included the sound-deadening construction covered by the Norris patent.

Subsequent to the above-mentioned license a number of other licenses were granted to the beginning of the present suit, all of these licenses including rights to manufacture and use the Norris invention upon which the patent in suit is based. The licensees manufactured and sold devices made in accordance with the patent in suit and substantial royalties were collected under these licenses.

4. Notice of infringement of the Norris patent was given to the Navy Department on behalf of the C. F. Burgess Laboratories, Inc., by a letter dated July 22, 1938, and on behalf of the Burgess Battery Company, a Wisconsin corporation, by a letter dated May 19, 1939.

5. The patent in suit has been involved in previous litigation in the case of *C. F. Burgess Laboratories, Inc.*, v. *Coast Insulating Corp.*, United States District Court for the Southern District of California. The District Court's opinion in this case is published at 27 Fed. Supp. 956. Appeal was taken from this decision to the Ninth Circuit Court of Appeals, whose opinion is published at 114 Fed. (2d) 779. Claims 1, 3, 4, 5, 6, 8, 10, 11, 14, 16, 17, and 23 were in issue in the District Court. Claim 4 was held valid and infringed;

claims 16, 17, and 23 held not infringed, and the remaining claims at issue were held invalid for indefiniteness and as being too broad and general in view of the prior art. The appeal was prosecuted only on the claims which were held invalid and not infringed. The Court of Appeals held claims 1, 3, 5, 6, 8, 10, 11, and 14 invalid, and claims 16, 17, and 23 not infringed.

SOUND, TRANSMISSION, AND ABSORPTION

6. Sound in the ordinary accepted sense of the term is a wave motion of the air which originates when a body is set into vibration. The vibrations of the generating body are transmitted to the surrounding air and result in waves of alternating condensation and rarefaction of the atmosphere. These waves are propagated in all directions from the source of the sound with a velocity of 1,120 feet per second at ordinary temperatures.

The vibrations which the human ear can perceive range from a frequency of 20 per second to approximately 20,000 per second. Acoustical engineers in dealing with sound equipment usually consider the range of from 60 to 10,000 vibrations per second. Sounds of different frequencies possess different wavelengths. For example, sound at 128 vibrations per second has a wavelength of 9 feet, and sound at 4,000 vibrations per second has a wavelength of something like 3½ inches.

The sound waves from a source of sound may vary in character. Middle C on the piano gives a musical tone of 256 vibrations per second, and the waves emanating therefrom are made up of a definite fundamental pitch or tone, together with certain harmonics. This is a relatively simple wave structure as compared to the clicking of a typewriter, which is an unpitched sound and possesses various frequencies which lie in the range from 1,000 to 4,000 vibrations.

7. When a sound is generated in an enclosed space, such as a room, the sound waves strike the interior surfaces of the room, and if these are of ordinary building material such as concrete or hard plaster, which are good sound reflectors, the waves continue to be reflected back and forth and around the room and in all directions until the sound is absorbed to a degree so that it is no longer audible. This continued

reflection, which is termed "reverberation," may be present to such an extent that syllables of speech often apparently run together and are indistinct and difficult to understand. Reverberation, which in popular parlance may be said to make a room "noisy," is the cause of the majority of acoustical difficulties, and the principles involved in the present issue deal with the treatment of surfaces of enclosures so that the sound waves will be absorbed instead of reflected.

8. The action of various surfaces on sound waves is similar to that taking place with light waves in that no surface can be considered as 100 percent reflecting or 100 percent absorbing, and the majority of surfaces and materials both reflect and absorb sound to some extent.

Absorption of sound waves implies the dissipation of the vibrational energy. As an example, sound may be absorbed by the compressional motion of the individual fibers of an inelastic flexible and compressible material such as felt. A thick layer of felt or similar material will yield to the alternating pressure of sound waves and in so yielding will absorb a part of the sound energy which strikes it.

Sound may also be absorbed due to the porosity of certain materials. The alternating pressure of a sound wave actuates the air particles in the numerous channels in the interior of the material, and the resulting friction in the pores of the material acts to dissipate the energy of the sound wave.[1]

Sound-absorption material such as felt and rock wool owe their acoustical absorption both to their inelastic flexibility and compressibility, and also to their porosity.

9. Sound-reflecting and non-sound-absorbing materials in general may be exemplified by hard and unyielding surfaces such as steel or other metallic surfaces, concrete floors, plate glass, and ordinary plaster walls. Such surfaces reflect a large percentage of the sound waves striking them.

A sheet of material possessing elastic properties, when sufficiently thin to permit it to vibrate when sound waves impinge upon one of the surfaces, will transmit more or less sound wave energy to its opposite side, and to that extent

[1] Viewed from the standpoint of physics, the energy itself does not dissipate, but is changed through friction from the vibrational energy known as sound into molecular motion of the particles of the material known as heat.

may be said to be sound transparent. This is also a relative term, as a substance may be sound reflecting, sound absorbing and sound transparent to some extent.

While there is no clear line of demarcation between sound-absorbing surfaces and non-sound-absorbing surfaces, a material having an average absorption of less than 20 percent in the frequency range of from 256 cycles to 2,000 cycles per second would not usually be considered as sound absorbent.

10. The problem of treating a room or similarly enclosed space so that sounds created therein will be absorbed is not difficult when viewed from the acoustical standpoint alone. It is only necessary to line the walls and ceiling of a room with a heavy layer of sound-absorbing material such as felt or rock wool. While such a surface might be satisfactory from the acoustical standpoint, it would be subject to disintegration, and could not be cleaned, painted or decorated.

The problem presented to those skilled in the art therefore becomes one of providing a sound-absorbing surface which will be practical from a constructional, maintenance and architectural viewpoint as well as acoustically, and it is to this problem that the patent in suit is addressed.

THE PATENT IN SUIT

11. The thought or discovery expressed in the patent in suit is that when a layer of sound-absorbing material is structurally supported by a thin, rigid, self-sustaining membrane, such as sheet steel or similar sound-reflecting and non-sound-absorbing material, and this supporting sheet is provided with small perforations so spaced as to bear a certain relationship to the wave-lengths of the sound it is desired to absorb, such a composite structure will be equally or more efficient in sound absorption than the bare or unsurfaced layer of sound-absorbing material.

12. The specification gives instructions as to the use of the Norris structure. The patentee indicates that his invention is not limited to sheet metal but may be practiced by the use of other rigid sheet membranes such as vulcanized fibre sheets, bakelized sheets and veneered wood sheets, but indicates that he prefers using sheet metal. The patentee states that—

I prefer using a thin sheet metal membrane which may be composed of galvanized iron, tin or terne plate, ordinary black iron or stiff steel sheets. Other metals such as aluminum or duralumin sheets may be used for special locations.

With reference to the individual size of the perforations the patentee indicates that this is not dependent upon sound-absorbing characteristics but is controlled by such factors as ability to paint the sheet metal without plugging the perforations and the tendency of the sound-absorbing material to project through the perforations and be visible to the eye.

The relative total perforated area may apparently be anything from the specification as quoted below. Claim 14 however appears to establish the lower limit of 0.4%, and claim 11 the upper limit of 49 percent.

With reference to size and area, the patentee states—

> These sheets may be perforated in any suitable manner. The perforations may, for example, cover from 0.4% to 35% of the area of the metal or other rigid sheet although I do not limit myself to this range, and excellent results are obtained with a sheet in which about 16% of the surface is perforated. The perforating must be done with due regard to the size of the perforation and also to the spacing between perforations.
>
> The lower limit of size of the perforation usually is determined not by sound absorption considerations but by the difficulties resulting from the bridging over and closing of the perforation when the surface is painted. A round perforation 0.073 inches in diameter or any other shaped perforation having that minimum dimension is about the smallest that may be readily painted or enameled without plugging. The maximum size of a perforation is dependent upon the appearance of the tile and the tendency of the sound absorbing material to project through it and be visible to the eye. I favor a hole less than 0.125 inches for its minimum dimension where elongated holes are employed. A round hole 0.125 inches in diameter has an area of 0.0123 square inches. Holes smaller or larger than the dimensions given may be used.

13. With reference to the spacing of the holes, the patentee states—

> I have found that the spacing of the holes should be determined by the pitch of the sound which is absorbed.

> The lower the pitch of the sound, that is, the smaller the number of double vibrations per second and the longer the wave length, the greater may be the distance between the holes to secure the same absorption.

The specification suggests the use of both round and elongated holes and in the case of the latter refers only to the minimum dimension.

14. The specification then proceeds to set forth a detailed description of the sound-absorption characteristics of panels of perforated metal having a 1-inch balsam-wool backing, and makes reference to Fig. 14 of the drawings, which is a graph.

As explained in the specification, this graph instructs those skilled in the art that as the pitch of the sound increases (i. e., the wave-length becoming shorter) it is necessary to decrease the spaces between the holes.

In connection with this graph, which relates to holes of 0.073 inch in diameter, it is stated that the 1-inch balsam-wool backing alone has a sound-absorption of about 74 percent. With sound at a pitch of 512 double vibrations per second and the use of a metal diaphragm having a distribution of one 0.073 inch diameter hole per square inch in combination with the balsam-wool backing, the sound absorption increases to 78 percent.

When the pitch of the sound is increased to 1,024 double vibrations per second the maximum absorption of 78 percent is reached with about two holes per square inch. The holes are stated to be about 0.706 inch apart on centers with this spacing.

At 2,046 double vibrations, the maximum absorption is reached at about four holes per square inch, with a spacing of ½ inch on centers.

15. With reference to the higher pitched sounds which are not directly shown on the graph, the same indicates that the number of holes per square inch must be increased. In this connection, the specification states—

> Noises from typewriters, adding machines, dishes, and the like are high pitched (about 4,000 double vibrations per second). The curve of Fig. 14 indicates that the number of holes per square inch must be increased beyond 4 per square inch if the high-pitched noises are

to be absorbed. I have determined that a sound absorber backed perforated sheet metal with 16 holes per square inch, 1/4 inch apart on centers gives maximum results for that absorber for most conditions, absorbing both the low and most high-pitched sounds. This spacing is for holes 0.073 inch in diameter. With this diameter the holes are on an average of 0.177 inch apart, measuring between nearest edges of holes.

16. The claims in suit are as follows:

1. In the combination of sound-absorbing material and a facing therefor, a thin sheet of perforated metal forming such facing, the ratio of the unperforated area of said sheet to the openings therein being such as to expose an apparently substantially continuous surface to the sound waves.

2. In the combination of sound-absorbing material and a facing therefor, a thin sheet of perforated metal forming such facing, the perforations being substantially uniformly distributed over the area of said sheet and the average dimensions of the individual openings being less than the distance between the edges thereof.

3. In the combination of sound-absorbing material of high efficiency and means for confining and concealing the same, a thin layer of self-sustaining, non-sound-absorbing perforated material constituting such means, the openings therein being widely distributed over the area exposed to the sound waves and small enough to substantially conceal the sound-absorbing material.

4. In the combination of sound-absorbing material of high efficiency and means for confining and concealing the same, a thin layer of self-sustaining, non-sound-absorbing perforated material constituting such means, the openings therein being widely distributed over the area exposed to the sound waves and the aggregate area of said openings totaling not more than about 16% of said first area.

5. Sound-absorbing means comprising, in combination, sound-absorbing material and a thin, stiff member contiguous thereto with a plurality of openings therein, the ratio of openings to the area of said member being such as to expose an apparently substantially continuous surface to the sound waves.

6. A sound-absorbing structure comprising sound-absorbing material and a thin, self-sustaining material concealing the same with a multiplicity of small openings therethrough of average dimensions greater than the thickness of said self-sustaining material.

7. A sound-absorbing structure comprising sound-absorbing material and a thin, self-sustaining material concealing the same with a multiplicity of small openings therethrough of average dimensions greater than the thickness of said self-sustaining material and spaced from each other a distance in excess of said average dimensions.

8. Sound-absorbing means comprising, in combination, thick porous material having high capacity for sound absorption, and a thin, dense, perforated material having less sound-absorbing capacity, the spacing of the openings in said perforated material, as specified herein, bearing such relation to the length of the sound waves passing therethrough as to provide a combined sound-absorbing efficiency as great as that of said high capacity sound-absorbing material.

9. The combination with a sound-absorbing material, of a thin, sheet metal facing therefor having a multiplicity of small openings therein and supported at its margins, said openings having dimensions several times the thickness of said sheet metal and spaced between edges a distance in excess of said dimensions.

10. The combination with sound-absorbing material having an efficiency in excess of 70%, of thin, dense, foraminous material having an efficiency less than 25%, forming a facing therefor, the openings in said dense material being spaced, as specified herein, to permit the transmission of sound waves in such manner as to result in an efficiency in the combined materials in excess of that of said sound-absorbing material.

11. Means for deadening sounds reflected from a hard surface, comprising a layer of sound-absorbing material between the source of sound and said hard surface, and perforated sheet metal adjacent said sound-absorbing material between it and said sound source, the openings in said sheet metal being substantially uniformly distributed over its surface and having a total area less than the unperforated area of said metal.

12. Sound-absorbing means as in claim 5, in which the area of the individual openings averages from 0.004 to 0.0123 square inches.

13. Sound-absorbing means as in claim 5, in which said openings have a minimum dimension less than 0.125 inch and are spaced at least about 0.177 inch apart at their minimum distance.

14. A sound-absorbing structure as in claim 6, in which the openings cover about 0.4% to 35% of total area.

* * * * *

23. In a building structure, the combination with a wall or ceiling surface of a room, of an exposed foraminous rigid non-sound-absorbing sheet spaced therefrom, a sound-absorbing material between said sheet and said wall or ceiling surface and concealed by the former, and means for supporting said sheet in said spaced relation and adjacent to said surface, the ratio of the exposed area of the sheet to the openings therein being such as to provide a substantially continuous decoratable surface.

17. The expressions such as "*thin sheet*," "*thin stiff member*," "*thin self-sustaining material*," used in the claims, when interpreted by the building art and by reference to the specifications of the patent in suit in which they are qualified by the word "*membrane*," mean a metal sheet or material of sufficient thickness only to support the sound-absorbing material in place and to maintain a rigid, smooth surface.

18. The phrase occurring in claim 1 and in substantially the same form in claims 3, 5, 12, 13, and 23, "*the ratio of the unperforated area of said sheet to the openings therein being such as to expose an apparently substantially continuous surface to the sound waves*," has reference to the exposing of the surface of the supporting facing when interpreted in the light of the patent specification and the file wrapper and contents of the Norris applications. Page 72 of the file wrapper of the first Norris application contains subject matter relating to the adoption of this phrase to distinguish over certain prior art cited by the Patent Office, in which a metal retaining member was nearly all cut away, leaving only a few crosspieces to support the sound-absorbing pad.

The term in this phrase "*substantially continuous surface*" makes these claims indefinite.

19. Claims 8 and 10 recite the sound-absorbing efficiency of the backing material, the facing material, and the efficiency of the composite structure.

The graph, Fig. 14 of the drawings, discussed in the specifications, is illustrative to those skilled in the art of the general characteristics of the patentee's composite structure comprising a sound-absorbing material with a non-sound-absorbing facing of sheet metal. In order to extend the application of this graph to various sound-absorbing materials, various sizes and shapes of perforations and at various sound fre-

quencies, it is necessary to submit the structure to a test in order to ascertain its sound-absorption coefficient.

Standard routine commercial tests to ascertain the absorption characteristic of sound-absorbing panels were established in 1920. Such tests, which utilize a standardized source of tone at definite frequencies and ascertain sound absorption by means of instruments, are for the purpose of more accurately measuring sound-absorbing characteristics of the materials tested than can be done by the human ear, and such tests are not experiments in the sense that they are a trial or observation made to confirm or disprove something doubtful.

20. A test such as has been referred to in the previous finding was made with sheet steel facing, this test exemplifying the absorbing effect of the sound-absorbing material alone and the composite effect of sound-absorbing material and the facing in accordance with the phraseology of claims 8 and 10. While this test was made *ex parte* by plaintiff's expert, Doctor Sabine, its result was agreed to as reasonable by defendant's expert, Mr. Swan.

This test was made with a sound-absorbent backing of 1½″ felt in combination with a perforated sheet steel facing 0.018″ thick and perforated with 5/64″ holes spaced on centers 0.176″ with a ration of perforated area of 15.4 percent.

The test which was made at frequencies from 137 to 2,048 cycles indicated an average absorption coefficient of 75.5 percent for the felt backing alone, and a coefficient of 78 percent with the combined backing and perforated sheet steel facing.

21. Some time between May 31 and June 20, 1927, the patentee Norris, through the Burgess Battery Company, completed the installation of a certain sound-deadening device in the office of Pickands, Brown & Company, of Chicago, Illinois. The type of construction here installed comprised a series of sound-deadening tile.

Each individual tile consisted of a perforated metal sheet bent up at the four edges to form a tile-like, open-faced box. A pad of sound-absorbent material cut to fit was placed in this box and the same was secured to the supporting surfaces by parallel furring strips of sheet metal **T**-shaped in cross-section which engaged with the turned-up edges of the

tile. The metal sheet was approximately 1/32″ or slightly less in thickness and the perforations were elongated in shape. The ratio of perforated area to the total area was 29 percent.

The white enameled perforated metal sheets forming the rear surface of plaintiff's physical Exhibit 3 are identical with those used in this installation except they are smaller in size. The installation of this structure at the office of Pickands, Brown & Company establishes the date of reduction to practice of June 20, 1927, for the inventions set forth in claims 2, 6, 7, 9, 11, and 14.

22. There is no satisfactory evidence as to the character or thickness of the material employed for the sound-absorbing pads, and no tests or data have been presented relative to the sound-absorbing efficiency of the combined facing and sound-absorbing material of the Pickands, Brown installation as compared to the bare surface of the sound-absorbing material alone.

There is no evidence as to whether the area of the individual perforations averaged from 0.004 to 0.0123 square inch, or that the openings had a minimum dimension less than 0.125 inch, or that they were spaced apart at least about 0.177 inch.

There is no satisfactory evidence of the date of conception and reduction to practice of the inventions set forth in claims 4, 8, 10, 12, and 13 of the patent in suit earlier than February 25, 1929, the filing date of the application which materialized into the patent in suit.

There is no satisfactory way of determining whether this installation is a reduction to practice of claims, 1, 3, 5, 12, 13, and 23. At a distance of 30 to 40 feet from the white enameled perforated sheets of plaintiff's physical exhibit 3 they form an apparently substantially continuous surface. At a distance of 5 to 10 feet they do not.

THE ALLEGED INFRINGING STRUCTURES

23. There are four types of sound-deadening structures, charged as infringements in this case, each type comprising a backing or sound-absorbing material of either fibrous glass or rock wool combined with felt and provided with a facing of thin, stiff perforated sheet metal. These structures were

manufactured for or by and used by the United States Navy.

The details of the four examples as regards the thickness of sound-absorbing material, spacing, and size of perforations, and other details as to the facings are given in the following table:

Example	Thickness of absorbent	Thickness of facing	Material of facing	Diameter of openings	Distance between centers	Spacing between edges of perforations	Percentage perforated
1	1.5	0.022	Corrosion-resistant steel.	0.093	0.25	0.157	12.6
2	2.5	.031	Nickel-copper	.156	.375	.219	15.52
3	3	.0185	Terne plate	.093	.25	.157	12.6
4	2.5	.035	Nickel-copper	.095	.25	.155	11

24. Example 2 as set forth above was installed as a lining for soundproof telephone booths in engine rooms on ships. The remaining examples set forth in the above table were installed and used for lining air ducts on ships through which air was forced to flow at varying velocities by means of power-driven blowers. The noise created in the ducts included sound frequencies of from 37 cycles per second due to the blower motor, up to about 1,800 cycles per second, which was a shrill whistle of the air as it passed through the ducts.

The acoustical problems involved in the sound treatment of a room and a duct are the same.

Examples 1, 3, and 4 were also used for soundproofing portions of access trunks on Navy ships. An access trunk is a square-shaped vertical passageway leading from the main deck down to the engine room and provided with ladders and platforms at various levels. Telephones were installed in the access trunks and the sound-deadening treatment was applied to the walls of the access trunk adjacent the telephone.

25. In all of the installations the perforated metal facing was installed in as large sections or sheets as could be conveniently handled, the sheets being soldered together at their margins. The facing was held in place not at the margins but by means of a series of spaced bolts welded or fixed to the inner surface and projecting through the sound-absorbing material and through the sheet metal facing as

shown on the drawing, defendant's exhibit 15, or else by self-threading screws placed at certain intervals through the facing and into L-shaped supporting clips, as shown in defendant's exhibit 16, which is typical of the construction of the telephone booths used in connection with example 2.

In the installation on the Navy ships, all of the perforated facing material was noncorrosive in character and was neither painted nor intended to be painted.

Samples of perforated sheet metal (plaintiff's physical exhibits 36 and 37) are typical respectively of the size and character of the perforations used in the four Government structures, exhibit 36 being substantially typical of examples 1, 3, and 4, and exhibit 37 being typical of example 2.

26. Examples 2 and 4 as given in the tabulation in Finding 23 correspond respectively to the data given in defendant's Exhibits 16 and 15, which are typical of structures installed by and for the defendant between August 31, 1938, and July 7, 1939, and used by the defendant during that period.

27. Claims in suit 1, 3, 5, 12, 13, and 23, which define the perforated facing as "apparently substantially continuous" or to "substantially conceal the sound-absorbing material" or to provide "a substantially continuous decoratable surface," are indefinite by virtue of this phraseology, and the application of their phraseology is uncertain when applied to the perforated facings used by the defendant and substantially exemplified by plaintiff's physical exhibits 36 and 37.

28. Claim 9 of the patent in suit specifies that the thin sheet metal facing is supported "at its margins." In the Government structures the individual sheets forming the thin metal perforated facings are soldered together to form an integral surface, and this is held in place by bolts or screws, the heads of which protrude through or are upon the exterior surface of the facing.

The phraseology of this claim does not apply to the Government structures.

29. Claim 8 describes the Norris structure in terms of sound-absorbing efficiency and defines the invention as one in which the combination of the backing or sound-absorbing material with the sheet metal facing has an absorbing efficiency as great as that of the sound-absorbing material alone.

It prescribes that the spacing between the openings in the facing depends upon the length of the sound wave passing through it.

Claim 10 also defines the invention in terms of efficiency, setting forth that the efficiency of the combined materials, i. e., the backing and the facing, is in excess of the sound-absorbing or backing material alone.

Plaintiff's expert made two comparative *ex parte* tests in connection with the sound-absorbing material used by the defendant and perforated metal facing similar to plaintiff's exhibits 36 and 37, which substantially exemplify the facings used by defendant. The results of these tests were agreed to as reasonable by defendant's expert, both tests ascertaining the average coefficient of absorption at frequencies from 137 cycles to 2,048 cycles, inclusive. The first test exemplified example 1 of the Government structure, the perforated facing having the same values as tabulated in Finding 23. The results of this test showed a sound-absorbing efficiency of the backing alone of 88 percent and of the backing in combination with the facing of 85.7 percent.

The second test exemplified example 2 of the Government structure as set forth in the tabulation in Finding 23. In this case the sound-absorbing efficiency of the backing alone was 93.7 percent and that of the backing in combination with the perforated facing 91.9 percent.

In neither instance was the efficiency of the combined backing material and the perforated facing equal to or in excess of the efficiency of the backing material alone. The phraseology of claims 8 and 10 does not apply to the Government structure.

30. The phraseology of claims in suit 2, 3, 4, 6, 7, 11, and 14 is applicable to the structures used by the Government.

PRIOR ART AND KNOWLEDGE

31. The following patents and publications were available to those skilled in the art on the respective dates indicated:

U. S. Patent to Dillon, No. 1,385,741, issued July 26, 1921.

U. S. Patent to Mazer, No. 1,483,365, issued February 12, 1924.

U. S. Patent to Trader, No. 1,554,179, issued September 15, 1925.

U. S. Patent to Trader, No. 1,554,180, issued September 15, 1925.

British Patent to Stevens, No. 4,843, of 1887.

Publication entitled "The Dynamical Theory of Sound," pp. 248–253, Second Edition, published 1925.

The following patents were issued on application filed in the United States Patent Office on the dates indicated:

U. S. Patent to Delaney, No. 1,660,745, issued February 28, 1928, on an application filed June 30, 1926.

U. S. Patent to Rosenblatt, No. 1,751,249, issued March 18, 1930, on an application filed June 23, 1927.

32. All the patents listed as prior art in the above findings, with the exception of Rosenblatt and the British patent to Stevens, are of record in the Patent Office file of the application which matured into the patent in suit.

On page 8 of an amendment filed June 4, 1929, with the Examiner of the Patent Office having charge of this application, the following statement appears:

> As a matter of record, the prior art over which the foregoing claims have been allowed is hereby copied into this application from the earlier application 212,265.
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> * * * * *
>
> Mazer, 1,483,365.
> Trader, 1,554,179.
> Delaney, 1,660,745.
>
> * * * * *
>
> Dillon, 1,385,741.
> Trader, 1,554,180.

33. United States patent to Dillon, 1,385,741, discloses a structure referred to as a sound deadener for building structures. In the first form of construction disclosed by Dillon a sheet of unwoven, sound-absorbing material such as felt is secured to the walls or ceilings by means of wooden strips and nails. This is then covered by a woven textile fabric membrane spaced from the unwoven material by means of cleats, the fabric membrane being perforated.

This structure is stated to provide a chamber in which the sound waves, after being broken by passing through the perforated fabric membrane, are retained or absorbed or passed through the unwoven material.

In a modification of the Dillon structure the space between the woven fabric and the sound-absorbing fabric is omitted, the specification stating with respect to this modification that "the woven membrane is arranged in intimate contact with the unwoven material."

With respect to the character, size, and spacing of the perforations, the specification states as follows:

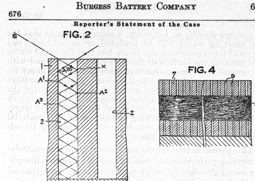
> It is obvious that the perforations may be of any shape or form and spaced apart regularly or irregularly according to the desired design or requirement.

This disclosure does not instruct those skilled in the art as to any dimensions of the structure or any size or spacing of the perforations in the fabric membrane nor does it disclose or suggest to those skilled in the art the use of a perforated metal facing or a facing that is of self-sustaining and non-sound-absorbing material.

34. United States patent to Mazer, 1,483,365, discloses a building block constructed for the purpose of absorbing sound. The specification discloses a block of plastic composition and suggests such materials as "gypsum, sand and cement mixtures, sand and lime mixtures, and the like." Such a block is constructed with a relatively thick facing which is provided with a number of apertures penetrating in from the face, these apertures being defined in the specification as "*long, narrow apertures, the length of which is considerably greater than the width of the openings.*" Figs. 2 and 4 of the patent are reproduced herewith, Fig. 2 illustrating the alleged sound-absorbing effect of these apertures.

With reference to Fig. 2, the specification teaches those skilled in the art that if a sound wave "S" strikes one of the tube-like apertures at any angle it undergoes a large number of impacts against the sides of the aperture, with partial absorption at each successive impact, so that when the sound travels into the aperture and then out of it, as indicated by Fig. 2, the sound may be entirely absorbed in the relatively long walls of the apertures.

Fig. 4 shows a modification in which the central portion of the block is filled with felt or some other highly sound-absorbing material.



The structure and method of sound-absorption, as disclosed by Mazer, differ from the Norris patent in suit, in that Mazer teaches the art a principle of sound absorption in long narrow apertures formed in a block having a thick facing for this purpose. As stated, this is also used in connection with sound-absorbing material in the middle of the block.

The Mazer specification gives no dimensions and does not disclose a thin metal perforated facing or a thin nonsound-absorbent facing. On the contrary, it teaches those skilled in the art to use a facing of sufficient thickness to provide for sound absorption in the facing itself.

35. United States patent to Trader, 1,554,179, discloses a sound absorbing material operating on the same principle of sound-absorption as disclosed in the Mazer patent referred to in the previous finding. The material disclosed in the specification is referred to as sound-absorbing material either in the form of blocks or sheets, characterized by extreme porosity and approximately 1″ in thickness. These sheets have perforations extending either entirely through them as shown in Fig. 1 of the patent, or partially through, as shown in Fig. 5. The function of these perforations is set forth as follows:

> By the provision of suitable apertures, cavities, recesses or the like, in the surface of the material exposed to the sound waves, and into which they are projected

> either directly or indirectly, I secure the result that the entering waves will be pocketed or smoothered [*sic*] and thus eliminated, due to the fact that the sound waves striking the surface of the wall or ceiling covered with sound absorbing material prepared according to my invention, are almost entirely isolated or confined, within such recesses or cavities, and to the further fact that the provision of these cavities, recesses or the like which can be entered by the sound waves, provide a much larger area of sound absorbing surface that the material heretofore employed, which is characterized by its cellular or porous structure.

This patent discloses to the art a sound-absorbing material possessing perforations or recesses extending into or through the sound-absorber, in which perforations the sound waves are dissipated. This patent does not disclose nor suggest a combination of a backing of sound-absorbing material with a thin perforated facing of metal or non-sound-absorbing material.

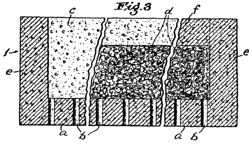
36. United States patent to Trader, 1,554,180, discloses the same sound-absorbing construction as referred to in the previous Trader patent, the illustration being substantially the same. This second Trader patent, however, relates to the use of the sound-absorbing apertures in the specific type of material known as "Celotex" or "Insulite." The specification discusses the porous, fibrous nature of "Celotex" and "Insulite" and indicates that each of these materials is made from wood pulp, the surface pores of which when dry are more or less closed due to films or skins caused by the pressure to which the pulp is subjected during the process of squeezing out the surplus water.

The specification indicates to those skilled in the art that the perforations, either made entirely through the material or partially into it, permit the sound waves to readily pass into the interior spaces of the fibrous structure in such a manner as to render impossible further reflection back into the room.

The disclosure of this patent is similar to that of the other Trader patent in that it merely discloses a sound-absorbing material possessing perforations. It does not disclose a combination of a backing of sound-absorbing material with

a thin perforated metal or similar non-sound-absorbing facing.

37. United States patent to Delaney, 1,660,745, discloses an acoustic building block or slab intended to operate on the same principle of sound absorption as disclosed in the Mazer and Trader patents referred to in the previous findings. Fig. 3 of the patent, which is reproduced herewith, is illustrative of the Delaney construction, this figure illustrat-



ing a relatively thick facing provided with long, narrow apertures. The specification states with respect to the construction of the shell and the functioning of the perforations that—

> The material for forming the shell is preferably of a strong porous nature and the perforations *b* in the facing give such facing a high sound-absorbing value and may yet be made to receive any ornamentation or to be made smooth and yet attractive as a finish.

The interior of the shell is stated to be filled with sound-absorbing material such as "asbestos wool, loose pumice, hair, cork, or substances having like sound-absorbing properties."

The specification contains a statement that the shell—

> * * * may be made of any suitable material or materials such for instance as plaster, cement, fibrous material, wood, terra cotta, or in some instances, metal.

The specification, however, fails to teach those skilled in the art how a nonsound-absorbing material such as metal could be used for the relatively thick facing disclosed, and the reference to metal is inconsistent with the method of sound absorption indicated in connection with the preferred form, with reference to which it is stated that the *facing* has "a high sound-absorbing value."

This disclosure does not teach the art that a *thin* metallic non-sound-absorbing facing, when suitably perforated in accordance with sound-wave lengths to be absorbed and used in combination with a backing of sound-absorbing material, will permit a sound absorption substantially identical in efficiency with the sound-absorbing backing material.

38. United States patent to Rosenblatt, No. 1,751,249, discloses a sound treatment consisting of a sound-absorbing element such as felt upon which a membrane is placed by means of a layer of paste or glue. The patent does not state of what the membrane is made. A coating of paint, enamel, or plaster is then applied to the outer surface of the membrane, it being stated that the final coating alone is disadvantageous from the standpoint of maximum absorption, although usually necessary from an ornamental standpoint.

The specification then indicates that a multiplicity of minute pores or openings is formed through the coating or membrane so that the sound waves may reach the sound-absorbing material. It is suggested that such perforations can be made by such mechanical means as a roller studded with a multiplicity of sharp, thin points, the specification suggesting the use of points approximately one-hundredth of an inch in diameter and spaced on centers one thirty-second of an inch apart. This patent discloses a sound-absorbing material covered by a perforated facing, one constituent of which is plaster or enamel.

This patent was granted on an application filed in the United States Patent Office on June 23, 1927, which date is subsequent to the Burgess Battery installation in the office of Pickands, Brown & Company of Chicago, Illinois, as set forth in Finding 21.

39. British patent to Stevens, No. 4,843, of 1887 relates to a gas engine and a muffler or silencer therefor. The muffler is shown in two forms. Fig. 6, which is pertinent to the

present issue, discloses a silencing arrangement comprising an exhaust pipe or duct. The interior walls of this duct are lined with what the patentee states to be "incombustible sound-damping material, for instance, asbestos, so that the noise produced by the expulsion of the exhaust gases is damped thereby." This sound-damping material is held in place by a facing of sieve-like perforated sheet metal.

The Stevens patent discloses a backing of sound-absorbing material held in place by a thin, stiff, self-sustaining perforated facing of non-sound-absorbing material.

This disclosure, with the exception that the size and spacing of the perforations of the perforated metal sheet are not specified, is analogous with both the construction suggested by the patent in suit and the Government structures alleged to infringe, especially where used as sound-deadening lining for air ducts.

40. The publication "The Dynamical Theory of Sound" published in 1925 by Horace Lamb begins a discussion on page 248 termed "Transmission of Sound by an Aperture." The article refers to the transmission of sound waves by an aperture in a thin screen where dimensions of the aperture are small compared with the wave-length, and gives a mathematical formula for the determination of the amount of sound energy transmitted through the opening.

The publication next discusses an aperture in the shape of a long narrow slit whose breadth is small compared with the wave-length of the sound, and gives a second formula for determining the energy to be transmitted, this formula including as algebraic expressions both the minimum dimension of the opening and the intervening portion of the screen. By the use of such formula those skilled in the art can calculate in advance the desired minimum dimensions of apertures and their spacing for passing any given percentage of sound energy through the screen at a given wave-length.

The publication gives as a numerical example of the use of this formula a specific instance in which the wave-length of the sound is ten times the interval between the centers of the successive apertures. With such spacing, and if the apertures form only 10 percent of the whole area of the screen, 88 percent of the sound will pass through. Application of this example to a sound frequency of 512 cycles which

has a wave-length of a little over two feet, shows that with a width of aperture of 0.2″ and a distance between apertures of two inches, 88 percent of the sound energy will pass through the screen. If this example is applied to a sound frequency of double this value, or 1,024 cycles, and the same interval of space as suggested by the formula is maintained, the distance between the apertures would become about one inch.

The Lamb article teaches those skilled in the art the same relationship between sound frequency and spacing between apertures as is set forth by the patent in suit, in that the interval between the centers of successive apertures decreases as the sound frequency increases in order to maintain the same efficiency of sound transmission through the screen.

41. Sound treatment of rooms and enclosed spaces and the general effect of sound-absorbing materials were known to those skilled in the art more than two years prior to the filing date of the original Norris application.

Claims in suit of the Norris patent are directed to a structure in which such sound-absorbing material is held in place by a thin, stiff, self-sustaining perforated facing of non-sound-absorbing material. Such combination is shown in the British patent to Stevens, in which, similar to the preferred embodiment of the patent in suit, a perforated metal sheet is used to hold the sound-absorbing material in place.

Claims 1, 3, 5, 12, 13, and 23, which define the facing as "apparently substantially continuous" or to "substantially conceal the sound-absorbing material" or to provide "a substantially continuous decoratable surface," are uncertain and indefinite as to the size and spacing of the perforations they are intended to cover. These claims are invalid.

42. The subject matter of claims in suit 2, 4, 6, 7, 11, and 14 differs from the disclosure of the British patent to Stevens only by a selection of particular relative dimensions and spacing of the perforations and the ratio of perforated to nonperforated area.

Those skilled in the art and desiring to make use of the thin perforated sheet metal of Stevens in holding the sound-absorbing material in place, could use the Lamb publication to design the apertures and the spacing between them in such manner as to transmit a maximum portion of the sound

energy through the sheet metal facing for any given wave-length. If desired, the perforated area of 10 percent mentioned in the Lamb publication could be used, which area is stated to pass 88 percent of the sound energy.

The phraseology of claims 8, 9, and 10 is not applicable to the Government structures and these claims are not infringed.

43. The claims of the Norris patent in suit are anticipated by and define no patentable invention over the prior art listed in finding 31.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff, the assignee of the Norris patent, 1,726,500, sues to recover damages for its alleged infringement. The defendant defends upon the ground, among others, that the alleged invention was anticipated by prior art and knowledge, and, therefore, was lacking in patentable novelty.

The patent is on sound-deadening construction. It consists, briefly, of a sound-absorbing backing, such as felt or wool, covered and held in place by a thin membrane of sheet steel, tin, veneered wood, or similar sound-reflecting material, punctured at intervals to permit the passage of the sound waves through the membrane into the sound-absorbing backing.

Most of the claims in suit are indefinite as to the size and spacing of the holes in the membrane. For instance, claim 1 says that "the ratio of the unperforated area of said sheet to the openings therein being such as to expose an apparently substantially continuous surface to the sound waves." Claims 5 and 23 are substantially to the same effect. Claim 2 says only that the dimensions of the holes should be less than the distance between the edges thereof. Claim 3 says the holes should be small enough to conceal the sound-absorbing material. Claim 6 says the size of the holes should be greater than the thickness of the membrane. Claim 7 is a combination of claims 6 and 2. Claim 9 is also a combination of claims 6 and 2, but adds the statement that the membrane is supported at its margins. Claim 12 specifies the size of the holes at from 0.004 square inch to 0.0123

square inch. Claim 13 says the holes should have a minimum dimension less than 0.125 inch and should be at least 0.177 inch apart.

Claim 11 says that the total area of the holes should be less than the unperforated part of the membrane. Claim 14 says the holes should cover from 0.4 percent to 35 percent of the area of the membrane. Claim 4 says the holes should cover not more than 16 percent of the area. Claim 8 says the spacing of the holes should bear "such relation to the length of the sound waves passing therethrough as to provide a combined sound-absorbing efficiency as great as that of said high capacity sound-absorbing material."

It will be noted that the size of the holes and the spacing between them varies greatly, the total area to be perforated varying from 0.4 of 1 percent to 49 percent. The only guide found in the claims to determine the size and number of the holes is that they should be of a size greater than the thickness of the membrane, that the space between them should be greater than their size and that the number of them should bear that relation to the sound waves passing through them which gives as great an efficiency to the backing when covered by the perforated membrane as it had without it. The size of the holes and the space between them that would give equal efficiency is not stated in the claims; but in the specifications it was said "that the spacing of the holes should be determined by the pitch of the sound which is absorbed. The lower the pitch of the sound, that is, the smaller the number of double vibrations per second and the longer the wave length, the greater may be the distance between the holes to secure the same absorption."

We have, then, a patent consisting of a sound-absorbing backing covered with a thin sound-reflecting material of wood or metal to conceal the backing and to hold it in place, with holes in it of a size and spaced apart at a distance dependent on the pitch of the sound to be absorbed. The graph in the specifications shows that maximum absorption of sound waves of 512 double vibrations per second is obtained with holes every square inch. When the pitch of the sound is doubled there may be two holes per square inch, and when doubled again, four holes per square inch, etc.

The defendant says all this was anticipated by the prior art and knowledge. It points first to the Dillon patent No. 1,385,741. The principle of this patent and the one in suit is the same, except (1) the covering of the backing in the Dillon patent is a woven textile membrane, whereas in the Norris patent wood or metal is used; and (2) Dillon does not say he spaces his perforations according to the pitch of the sound to be absorbed.

The Mazer, Trader and Delaney patents all use a sound-absorbing backing, but they differ from the Norris patent in that the facing is thick and itself is designed to absorb some of the sound. This is accomplished by long apertures through the facing, the theory being that the sound waves bounce back and forth down the sides of the aperture, which is said to have the effect of deadening the sound. This is not a feature of the Norris patent.

As stated, one difference between the patent in suit and the Dillon patent was the use by the patentee of a thin metallic or wooden membrane, instead of the textile membrane used by Dillon. However, in the British patent issued to Stevens perforated sheet metal was used to hold the sound-deadening material in place. This patent clearly disclosed the practicability of using metal instead of a woven textile fabric as the facing for the sound-absorbing material. That the patent in which this disclosure appeared is a foreign patent is immaterial under section 31 of 35 U. S. C. *In re Cross*, 62 F. (2d) 182; *Becket* v. *Coe*, 98 F. (2d) 332.

The Norris patent differs from the Stevens patent only in that the latter says nothing about the size of the holes nor the spacing between them.

No patent referred to by defendant contains what seems to us to be the distinctive feature of the Norris patent, to wit, the spacing of the holes in accordance with the wave length of the sound to be absorbed. This, however, was a principle known in the art. Lamb in his book on "The Dynamical Theory of Sound" treats of the transmission of sound through apertures. He sets forth a formula for computing the sound transmission through apertures, depending on the size of the openings, the spacing between the openings, and the wave length of the sound to be absorbed.

This is the only feature of the Norris patent which in our opinion differs from prior patents, and it had been anticipated by the Lamb publication. See *Freyn Engineering Co.* v. *Coe*, 79 F. (2d) 134.

In the case of *Burgess Laboratories, Inc.*, v. *Coast Insulating Corp.*, 27 F. Supp. 956, the District Court held claim 4 valid, but it does not appear from a reading of the opinion that the Stevens patent and the Lamb publication were relied on in that case. In our opinion this patent and this publication, taken in conjunction with the Dillon patent, clearly anticipate the patent in suit.

We are of opinion the Norris patent is invalid for lack of novelty. It is, therefore, unnecessary for us to discuss whether or not the defendant's construction infringes the Norris disclosure.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

COATH & GOSS, INC., A CORPORATION, v. THE UNITED STATES

[No. 44043. Decided June 5, 1944]

On the Proofs

Government contract; evidence not sufficient to show breach of contract by defendant in delay.—It is *held* that the evidence submitted by the plaintiff, when considered in connection with that submitted by the defendant is not sufficient to show that the defendant is properly chargeable as for a breach of contract with general damages for any of the delay of 77 days in completion of the work under the contract in suit, and plaintiff is not entitled to recover.

Same; delay for which both parties to contract were responsible.—Where both parties to a contract contribute to a delay, neither can recover damages, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.

Same; delay in furnishing drawings and models admitted by defendant.—Where there was an unreasonable delay by defendant's

architect in furnishing drawings and models, which is admitted by the defendant; it is *held* that this delay, although within the general delay period of 77 days, was a breach of the contract in respect of the particular parts of the work to which it related, and plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Frederic N. Towers, for plaintiff. *Frost, Myers & Towers* on brief.

Mr. Philip Mechem, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff brought this suit to recover $11,082.62 as damages for breach of contract resulting from alleged unreasonable delays by defendant of 77 days in connection with the construction by plaintiff of a post office building at Ft. Scott, Kansas. Defendant denies that any portion of the ultimate delay beyond the contract time in the completion of the work as a whole was chargeable to it, and therefore insists that it is not responsible, as for a breach, for damages arising from general expenses caused by delay.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation having its chief office in Chicago, and is engaged in the general contracting business.

2. On December 21, 1934, defendant issued an invitation for bids for construction of a post office and courthouse building at Fort Scott, Kansas. Plaintiff was the low bidder and on March 11, 1935, a contract (numbered T1–PW–1759) was entered into by plaintiff and defendant providing for the erection of the post office and courthouse building (referred to for convenience hereinafter simply as the post office building) by plaintiff for a consideration of $186,400.

3. The contract provided that the work should be completed within 300 calendar days after the date of notice to proceed. Notice to proceed was given on March 22, 1935, making the date for completion January 17, 1936. By change order of July 15, 1935, an addition to the contract work (consisting of the construction of an additional sewer) was made; the change order provided for the addition of $387.64 to the consideration and that the time for completion of the work should be extended 20 days, thus making the total con-

tract time 320 days and making the date for completion February 6, 1936. Work was begun on or about April 9, 1935, and completed on April 23, 1936.

4. The progress of the work was delayed by a number of factors. For convenience, these delays may be put into three groups (each of which will be the subject of a finding) as follows:

Delays caused by weather; delays attributable to plaintiff; delays attributable to defendant.

5. *Delays Caused by Weather.*—The early part of the contract period was rainy and on a considerable number of days all work had to be suspended because of the presence of water and mud. Defendant's construction engineer estimated 12 days as lost by reason of rain during the early portion of the work, which was reasonable. This contributed to the ultimate delay in completion of the work.

6. *Delays Attributable to Plaintiff.*—Plaintiff received notice to proceed March 23, 1935, and on or about April 9, 1935, commenced the preliminary work of erecting job buildings, etc., and some clearing. Excavation started April 13, 1935. Plaintiff was to some extent unduly slow in commencing performance of the work on the project.

A delay resulted from plaintiff's failure to furnish reinforcing steel when it was needed, and also in furnishing structural steel. The job was held up for lack of steel and also for lack of adequate men and equipment to handle it.

June 13, 1935, the defendant's supervising engineer wrote plaintiff that the work had been virtually at a standstill for two weeks by reason of the aforesaid delays. June 25, plaintiff secured a crane adequate to handle the steel, but for lack of adequate skilled labor the construction of steel was not actually started until June 28, 1935.

Plaintiff also failed to obtain prompt delivery of cut stone and copper flashing which delayed its work.

Delay was caused throughout the middle and the latter part of the contract on part of plaintiff by improper plumbing work, which was performed by plaintiff's subcontractor in plumbing and heating work. Radiator stubs were misplaced, necessitating time for removal and reinstallation. Pipes in partitions were improperly installed causing numerous leak-

ing joints, resulting in serious delay and in holding back the building of certain tile partitions. These defects had to be corrected and pipes relocated. November 19, 1935, defendant's district inspector included a list of various items in his report, copy of which was furnished plaintiff. Defendant's construction engineer wrote plaintiff under date of February 17, 1936, advising that inspection showed 50% of the radiator stubs had been set in the wrong position. November 20, 1935, plaintiff wrote to its plumbing and heating subcontractor concerning these delays, advising that the situation was holding back the entire job and suggested that the subcontractor employ additional help to expedite the work. Delays incident to the plumbing and heating subcontractor caused delay of 39 days.

7. The foregoing delays attributable to plaintiff amounted to at least 82 days, made up of 7 days for delay in starting, 36 days for delay in securing and installing steel, cut stone and copper flashing, and 39 days for delays incident to the plumbing and heating work.

8. *Delays Attributable to Defendant.*—Defendant contracted with an architect, Mr. Glover, for preparation of plans of the post office building. Part of the work contracted to be done by Mr. Glover, was the furnishing or approving of drawings and models for various items of work that were to be furnished by plaintiff's subcontractors. It was impossible to begin the fabrication of these items until the drawings or models were prepared or approved by the architect. In a number of instances the subcontractors and, resultantcy, the plaintiff, were delayed in connection with certain features of the work in general by the failure of the architect to prepare or approve these drawings with proper promptness. One instance of this had to do with certain iron spandrels used under the windows in upper floors, partly to support the window frames and partly to reduce the thickness of the walls at those points, thereby facilitating the placing of radiators under the windows. Plaintiff wrote asking for models for the spandrels in July 1935, but the models were not furnished by the architect to the subcontractor until November 8, 1935. The spandrels were then promptly fabricated, delivered, and set by January 4, 1936.

Plaintiff was at the point in the work where the spandrels would normally be inserted September 19, 1935, and in their absence was compelled to leave holes in the brick work, "toothing" them in for support and also to put in two-by-fours for further support. This necessitated extra work and expense in working around the space left vacant, and in inserting the spandrels when they were finally available.

Another instance of delay caused by the architect had to do with the stone caps set on the columns or pilasters. Plaintiff wrote asking for models for these in July 1935, and was ready for them October 2, 1935, but the models were not received from the architect until October 11, 1935, and the caps could not be fabricated and set until November 10, 1935. This delay necessitated the use of temporary supports pending the arrival of the caps which, in turn, increased the cost of inserting the caps when they did arrive.

Other items of delay caused by the architect had to do with the furnishing of color information for the hollow metal door frames. These had a baked-enamel finish which had to be applied in the subcontractor's factory, and the delay by the architect in furnishing information as to the color desired delayed the fabrication of the door frames and so delayed the progress of this work. There was also delay resulting from the failure of the architect timely to furnish detail drawings for the interior marble work, and delay resulting from the failure of the architect timely to furnish detail drawings for the millwork and interior trim. These delays were largely concurrent.

None of the delays incident to the architect's failure to furnish models, plans, and details promptly caused a total stoppage of the work.

9. The delay attributable to plaintiff in connection with plumbing and heating and the delays attributable to defendant in connection with spandrels and pilaster capitals were largely concurrent. It is, accordingly, impossible to compute accurately the extent of the delay attributable to defendant's architect. However, not more than 74 days of delay as to the features of the work mentioned were caused by the architect. However, out of consideration for plaintiff and to save it from payment of liquidated damages, defend-

ant, by letter dated July 23, 1936, gave plaintiff an extension of time of 80 days. The ultimate effect of all these delays was to prevent completion of the building within the contract period as extended by change order for extra work, February 6, 1935.

10. The progress schedule of defendant shows that with normal progress the contract work, taking into consideration the 20 days' extension of time, would have been 30% complete on June 25, 1935, but that it was, in fact, only 6% complete—a percentage of completion which the progress schedule shows should have been attained on May 1, 1935, thus making the work on June 25, 1935, 55 days behind time; in July with normal progress the work should have been 46% complete but actually was 19% complete; in August, with normal progress the work would have been 62% complete, but was actually 29% complete; in September, with normal progress the work would have been 75% complete, but actually was 42% complete; in October with normal progress the work should have been 85% complete but was actually 55% complete; in November with normal progress the work should have been 93% complete, but was actually 62% complete, said percentages being approximate due to 20 days' extension of time. Plaintiff finally completed the entire contract April 23, 1936.

Plaintiff endeavored to make up a portion of the delays incurred, but it is not shown that if the delays attributable to defendant (finding 8) had not occurred it could have completed the entire contract work by either January 17, the date originally fixed for completion or by February 6, 1936, the date to which the contract was extended under the change order for extra work. It is not shown that the delays of the architect directly contributed to the general delay in completion of the work.

11. It is impossible to determine definitely the number of days' delay on the part of plaintiff and defendant, respectively, many of the periods of delay running concurrently.

However, as appears from findings 5, 6, 7, and 10, and the progress schedule referred to in finding 10, delays amounting to at least 55 days took place in the early part of the work and prior to any delays attributable to defendant. These

delays were attributable to bad weather and delays chargeable to plaintiff. Such delay of 55 days was, therefore, not concurrent with any delays attributable to defendant, and delayed the final completion of the contract for an equivalent time. It is not satisfactorily shown that plaintiff was able to make up any of this delay. As to the other 21 days of delay incurred in completion of the work, it is not proved that they were not the result of the 39 days of delay attributable to plaintiff's plumbing and heating subcontractor. Plaintiff's evidence is, therefore, not sufficient to prove that any of the ultimate delay in completion is properly chargeable to the defendant.

Plaintiff's period of delay was, therefore, approximately from the extended date for completion, February 6, 1936, to the actual date of completion, April 23, 1936.

12. Plaintiff incurred certain extra expenditures as a result of this delay of 77 days, as follows:

(*a*) *Field Overhead.*

Superintendent 11 weeks at $65	$715.00
Timekeeper 9 weeks at $15	135.00
Labor foreman 2½ weeks at $30	75.00
Bricklayer foreman (by the hour)	83.13
Carpenter foreman 3 weeks at $50	150.00
Total	$1,158.13

(*b*) *Workmen's Compensation, etc.*—The applicable rate for workmen's compensation insurance was $7.10 for each $100 of wages. Applying this to the wage figure of $1,158.13 gives the result of $82.23.

(*c*) *Telephone and Telegraph.*—Plaintiff paid out during the period of delay the sum of $75.80 for telephone and telegraph.

(*d*) *Light and Power.*—Plaintiff paid out during the period of delay for light and power the sum of $34.10.

(*e*) Plaintiff paid out for progress photographs during the period of delay, $34.

(*f*) *Temporary heat.*—Paragraph 30 of the General Requirements provided:

> The contractor shall provide temporary heat as necessary to protect all work and materials against injury

from dampness and cold, to the satisfaction of the Construction Engineer.

During the latter part of November 1935, heat was needed in order to carry on plastering and other operations. The plumbing connections were not in proper condition nor had radiators arrived to be installed. November 23, the construction engineer agreed to allow plastering to commence on the first-floor lobby provided plaintiff arranged for some method of supplying heat. December 2, 1935, plastering was stopped because of lack of heat and unfinished plumbing. On the 4th of December the construction engineer agreed to allow plaintiff to install salamanders, in order that work of plastering might proceed. December 9, 1935 radiators arrived and plaintiff proceeded to set them for temporary heat and heat was turned on in the building for the first time December 10, 1935, and kept on until the middle of March.

Inferior plumbing and heating work contributed materially to the delay and difficulty that occurred during this period and under date of February 17, 1936, the construction engineer wrote plaintiff the letter mentioned in finding 6, regarding the unsatisfactory condition of the radiators and advising that about 50% of the stubs were set in wrong position and giving a list of defects which he requested to be remedied. Temporary heating was continued until March 1936.

Plaintiff's defective plumbing and heating connections and the absence of radiators at the time heat was needed on the project in November, was a substantial reason for the necessity of use of temporary heat, and this condition as to plumbing continued on into 1936. Permanent heating could not have been installed at the time heat was first needed.

Plaintiff's expenses on account of temporary heat were as follows:

Cost of gas	$156.56
Approximately 45 radiators at $7.50	337.50
Labor, 76 8-hr. days at 45¢ per hr	273.60
Total	767.66

(*g*) *Office Overhead.* Plaintiff's business overhead comprised office salaries, officers' salaries, office supplies and ex-

pense, rent, professional services, telephone and telegraph, traveling expense, automobile expense, estimating expense, insurance, taxes, depreciation on equipment, depreciation on automobiles, depreciation on furniture and fixtures, Nashville office expenses, including salaries and other expenses there, contributions, interest paid, bad debts, which were reduced by discounts received, interest received, profit on tax warrants, accounts payable written off, miscellaneous net damages awarded on Jamieson School.

Plaintiff's central office overhead remained practically the same during the contract period and the extended period regardless of delays. The same office organization functioned and carried on all the work and there was no increase in the amount of office overhead by reason of the delays occurring in connection with this project.

Plaintiff's claim under this item of $8,563.12, computed at $22.30 a day, is not satisfactorily proved by the evidence to be the proper amount of extra office overhead expense actually incurred during the delayed period of completion.

(*h*) *Excess Labor Cost.*—Plaintiff claims $2,111.82 as excess labor costs by reason of delay and arrives at this amount by deducting from $32,212.82 (its actual labor costs for the contract period as extended), an amount plaintiff had estimated for its labor prior to beginning work on the project, in the sum of $30,101.

The estimate prepared by plaintiff as containing its labor costs was lost and is not in evidence and there is no proof upon which to base a finding as to the accuracy of the estimated costs, nor as to any figure as increased labor costs. Furthermore, there is included in plaintiff's actual labor costs of $32,212.82, the items of labor that plaintiff claims under the other items of pilaster caps, spandrels, temporary heat, etc., thus duplicating certain of the claims. There is no proof as to what is or is not included in the estimate for its labor. There is no satisfactory basis upon which to base a finding as to excess labor costs.

(*i*) *Extra Expense—Stone Pilaster Caps.*—Pilaster caps were needed October 19, 1935, received approximately November 19, and set at that time. By reason of this delay plaintiff incurred extra expense, including reasonable over-

head and profit, in connection with preparation and installation of pilaster caps in the sum of $162.14.

(*j*) *Extra Expense—Cast Iron Spandrels.*—Plaintiff was ready for installation of spandrels September 19, 1935, and was delayed until January 4, 1936, when they were received and installed. By reason of this delay plaintiff incurred extra expense, including overhead and profit, in connection with the installation of spandrels in the sum of $266.80.

(*k*) *Equipment Rental.*—Plaintiff claims rental value of an Orton crane from approximately November 15, 1935, until after January 15, 1936, at $35 a day, amounting to $2,100; a double automatic hoist from approximately November 15, 1935, to January 10, 1936, in the sum of $87; a concrete mixer at $250 a month and a mortar mixer at $25 a month from approximately November 15, 1935, to January 10, 1936, $208.25 and $25, respectively.

Plaintiff owned all of the equipment except the automatic hoist, which it rented.

Plaintiff brought the crane on the job on June 25, 1935, for erection of the structural steel, which at that time was being delayed while waiting for the crane. After its use on the spandrels January 4, 1936, the crane remained idle at the site of the work until February 21, 1936, when it was stored. Subsequent to completion of the contract work plaintiff rented the crane to a local concern.

Plaintiff had another contract in Tennessee, and about December 15, 1935, sent a representative to that point to commence preparations for that contract. Plaintiff contends that the crane used on the instant project would probably have been used on the Tennessee contract but for this delay. However, the testimony does not show that plaintiff contemplated using the crane for the Tennessee contract, and it actually subcontracted the excavation work in Tennessee to a concern which had a crane.

13. Under date of March 23, 1936, plaintiff wrote the supervising engineer a letter setting forth its extra expenses incurred as a result of delays which it attributed to the defendant on the instant project. In this letter it claimed rental on crane, gas, and oil at $5 an hour for 20 hours, $100, for installation of the capitals. No claim was made for rental

value covering the extended periods set forth in the petition. The pertinent portion of said letter is as follows:

Extra Cost to set Stone Caps after adjoining work was complete and original scaffolds were not available:

Job ready for caps October 9, 1935.
Model received by subcontractor October 11, 1935.
Caps arrived and set completely November 10, 1935.

Cost:

Mason 20 at 1.25	$25.00	
Mason 20 at 1.00	20.00	
Engr. 20 at .62½	12.50	
Labor 20 at .45	9.00	
Setting Stone Caps		$66.50
Carpenter 20 at .90	$18.00	
Labor 30 at .45	13.50	
Cost of scaffold and removing		31.50
Rental on crane, gas and oil at $5, 20 hrs		100.00
Material for scaffold		10.00
Mason 15 at 1.25	$18.75	
Mason 5 at 1.00	5.00	
Laborer 5 at .45	2.25	
Cost of setting and removing temporary work in place of caps to carry stone work above		26.00
		234.00
10% Overhead		23.40
		257.40
10% Profit		25.74
		283.14

Extra Cost to set Spandrels:

Third floor ready for setting September 19, 1935.
Fourth floor ready for setting October 2, 1935.
Models received for spandrels November 8, 1935.
Spandrels shipped December 25, 1935.
Spandrels arrived January 1, 1936.
Spandrels set January 4, 1936.
Spandrels bricked in January 8, 1936.
Wall grounded for plaster January 9, 1936.
Wall plastered January 14, 1936.

Setting 25 Spandrels—cost over normal:

48 hrs. carpenter time at 90¢ rabbeting bottom of sills to permit slipped in spandrel between sill and head of frame on lower floor	$43.20

96 hrs. labor time at 45¢, cutting brick work and concrete to permit setting and proper anchorage	$43.20	
		$86.40
Temporary enclosures at spandrels:		
32 hrs. carpenter time at 90¢	$28.80	
16 hrs. labor at 45¢	7.20	
2 rolls of Sisalkraft paper	4.00	
		40.00
Bricklayers backing up spandrels—cost above normal if they had been built in as the walls were built		72.50
Grounding walls back of spandrel—cost over normal:		
24 hrs. carpenter time at 90¢		21.60
		220.50
10% Overhead		22.05
		242.55
10% Profit		24.25
		266.80

Attention is called to the fact that all of the above charges are the excessive cost over the normal cost to install this work if same had been done at the proper time. This figure does not represent the total cost of setting either of these items, due allowance having been made for the normal cost of setting same if it could have been done at the proper time in connection with adjoining work.

The above can be verified by studying correspondence and progress photographs. It includes no charge for additional expense, overhead, etc., etc., that we and our subcontractors were put to because of these delays.

In the foregoing letter plaintiff made no claim for the crane rental in connection with installation of the spandrels January 4, 1936, but the crane was used for installing both spandrels and capitals.

14. In connection with the concrete mixer and the mortar mixer, it is not shown that plaintiff had any other use for these items during the period of the contract or the delay period from February 6 to April 23, 1936.

Plaintiff's actual expense incurred for equipment is the rental of the hoist for which it paid $87. The fair rental *value* of the Orton crane was $100 for the period of installation of the spandrels. The fair rental *value* of the concrete mixer was $40 and for the mortar mixer $25 covering that general period.

15. Plaintiff's total excess costs as a result of the 77 days of general delay calculated from February 6 to April 23, 1936, is the sum of $1,866.14, consisting of the following:

Field overhead	$1, 158. 13
Workmen's Compensation	82. 27
Telephone & Telegraph	75. 80
Light & Power	34. 00
Extra Expense—pilaster capitals	162. 14
Extra Expense—cast iron spandrels	266. 80
Hoist	87.00
Total	$1, 866. 14

The court decided that the plaintiff was not entitled to recover as for damages for any of the delay of 77 days in completion of the contract in suit and that the plaintiff was entitled to recover for delay by defendant's architect in furnishing drawings and models.

LITTLETON, *Judge*, delivered the opinion of the court:

The evidence submitted by plaintiff when considered in connection with that submitted by defendant is not sufficient to show that defendant is properly chargeable as for a breach of the contract with general damages for any of the delay of 77 days in completion of the work. It is not denied by defendant that failure of its architect to furnish drawings and models promptly resulted in substantial delays in prosecution of the work as to parts thereof, and also resulted in certain extra expense. But the proof shows that these particular delays with reference to stone caps and spandrels did not interrupt the general progress of the work, or that they were the cause of plaintiff's inability to complete the work on time, or that any portion of the ultimate delay of 77 days in completing the work as a whole was chargeable to acts of defendant's architect. So far as the general work was concerned the delays of the architect ran concurrently with plaintiff's delays. Plaintiff's proof does show however the actual extra expense it was put to on account of the delay resulting from acts of the defendant independent of the expense resulting from other delays for which plaintiff was responsible from the beginning of the work until it was completed on April 23, 1936. Where both parties contribute to a

delay neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party. The prosecution of the work as a whole was delayed 82 days for causes for which plaintiff was wholly responsible (see findings 8 and 11). Under the proof defendant cannot be held responsible in damages for this general delay of 77 days beyond the contract completion date of February 6, 1936.

With reference to the particular delay in furnishing drawings and models, however, the situation is different. The architect delayed unreasonably in this regard and defendant admits the delay. This delay was a breach of the contract in respect of the particular parts of the work to which it related. In order to proceed with the general work it was necessary for plaintiff to make temporary arrangements and to go back later to install the stone caps and spandrels. This temporary work and extra work, when final installation was made, caused actual extra expense, including reasonable overhead and profit, of $162.14 with reference to the caps and $266.80 with reference to the spandrels, totaling $428.94 (see finding 12 (i) and (j).) Plaintiff is entitled to recover this amount.

Judgment for $428.94 will be entered in favor of plaintiff. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

PETER KIEWIT SONS' COMPANY v. THE UNITED STATES

[No. 45323. Decided June 5, 1944]

On the Proofs

Government contract; failure of subcontractor to comply with specifications.—Where plaintiff's subcontractor did not comply with the terms of the specifications with respect to the shop paint of metal casement windows for a Government housing project, resulting in extra expense; it is *held* that plaintiff is not entitled to re-

cover. *Struck Construction Co.* v. *United States*, 96 C. Cls. 186, distinguished.

Same; no recovery where extensions of time were granted and no liquidated damages assessed.—Where extensions of time on Government contract requested by plaintiff were granted and the contract was completed within the time limit as extended; and where no liquidated damages were assessed; it is *held* that plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Alexander M. Heron for the plaintiff. *Hinton & Heron* were on the briefs.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. William A. Stern, II*, was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Nebraska corporation with its principal office and place of business in Omaha. It is and has been for many years engaged in the business of general contracting, particularly in the construction of buildings.

2. November 17, 1936, the defendant, represented by the Federal Emergency Administrator of Public Works as contracting officer, entered into a contract with plaintiff under which plaintiff in consideration of $1,283,000 agreed to furnish all labor and materials and perform all work required for the construction of the superstructure for Logan Fontenelle Homes Housing Project in Omaha, Nebraska, in accordance with detailed plans and specifications. The contract and specifications with addenda thereto are in evidence as plaintiff's exhibits 1, 2, and 60, and they are incorporated herein by reference.

3. The contract set out in detail provisions for inspection, the character of material and workmanship required, provisions for damages in case of delays, how labor disputes were to be settled, and many other requirements.

The specifications contained provisions that—

> The decision of the Contracting Officer as to the proper interpretation of all Drawings and the Specification shall be final, subject only to appeal in case of dispute, as provided in the Contract. * * *
>
> No complaint on the part of the Contractor that work demanded of him is outside the requirements of the

Contract Documents or that any record or ruling of the Contracting Officer is unfair, shall be considered or entertained unless a protest is submitted in writing to the Contracting Officer within ten days after receipt of demands for such work or of such record or ruling stating clearly the basis of the Contractor's objections. Unless the Contractor files such protest as above provided, he will be deemed to have accepted, and shall be conclusively bound by, such demand, record, or ruling.

The specifications further provided how samples should be submitted and stated that—

> Approval of any sample shall be only for characteristics and for the use named in such approval and for no other use. Approval of sample shall not be taken, in itself, to change or modify any of the Contract requirements.

All samples were to be submitted through the Project Manager.

4. Under the specifications plaintiff was required to furnish and install metal casement windows. One provision in the specifications in regard to this item read as follows:

> Windows, metal window trim, and screen frames, before leaving the factory, shall be given one heavy prime coat of paint. Paint shall be guaranteed by the window manufacturer to provide a satisfactory base for subsequent coats of paint specified.

The specification with respect to the finish coat of paint which was to be applied on the shop coat read as follows:

> Formula No. 6, Quick-Drying Synthetic Interior Metal Enamel: This enamel shall conform to all the requirements of Federal Specification No. TT-E-560, Type "A."

Specification TT-E-506 referred to white and light tint gloss enamels, and one requirement with respect thereto was that their wet hiding power should be determined by the brush-out method on an impervious black and white checkerboard surface. Further requirements in the specifications included the following:

> *Painting:*
>
> * * * * *

Finish coat or coats of paint shall be the exact shade, or shades and textures, as approved from the samples submitted.

The finished work shall be free from runs and sags, defective brushing, and clogging of lines or angles.

Shop coats provided by others shall be in good condition and the surfaces well covered. Where required or necessary, bare or abraded spots shall be touched up by the Contractor, using the same materials as used in the shop coat, or other material if approved by the Contracting Officer.

* * * * *

Touching Up:

At the completion of all other work specified all painted work shall be touched up and restored where damaged or defaced and the entire work left free from blemishes.

* * * * *

Samples of Finishes:

After colors have been approved the Contractor shall submit *finish* samples of exterior and interior painted wood and metal work for the approval of the Contracting Officer. These samples shall be submitted on metal and wood 6 by 12 inches in size, all submissions to be in accordance with requirements of that portion of this Specification under heading of *Samples.*

5. The work was carried out under the supervision of an agency of the Federal Public Housing Authority which consisted of three divisions: the accounting division, housing division, and inspection division. The housing division acted as owners. This division was represented on the job by the Project Manager whose duties were described in a bulletin furnished plaintiff by the Director of Housing as follows:

The contractor should contact the Director of Housing, or the Project Manager as his representative, on all matters connected with the preparation and issuance of plans and specifications; taking bids; awarding contracts; interpreting plans and specifications (except that the ordinary application of plans and specifications in the field is the duty of the Inspection Division); approval of samples (materials and colors); approval of subcontractors (with certain exceptions noted herein); subcontract documents; issuance of Proceed Orders, Stop Orders, Change Orders; approval of shop drawings; and on such other matters

arising during the progress of the work as may be handled directly by the Housing Division.

The inspection division was represented by a Project Engineer and the duties of that division were described in the same bulletin as follows:

> The Inspection Division will act as the Contracting Officer's representative on all matters connected with the inspection of materials and workmanship; coordination and progress of the work; compliance with the plans and specifications and enforcement of contract provisions; certification of payments; and such other matters as may be delegated to the Inspection Division.

The contract provided that the work should be completed within 345 days from the date of receipt by the plaintiff of notice to proceed. Plaintiff received such notice December 7, 1936. The contracting officer granted various extensions in contract time aggregating 99 days, thereby fixing February 24, 1938, as the final completion date. Plaintiff completed the project February 22, 1938.

6. Among the items of work required was the furnishing and installing of metal casement windows. This work, including the application of a shop coat of paint to the windows before delivery to the project, was subcontracted by plaintiff to the Truscon Steel Company, hereinafter sometimes referred to as "Truscon." The painting of these windows after their installation and other painting on the job was subcontracted by plaintiff to Hansen Brothers, hereinafter sometimes referred to as "Hansen."

7. February 3, 1937, plaintiff submitted a sample metal casement window and screen through Truscon to the Project Manager. February 8, 1937, the Project Manager advised plaintiff with respect thereto as follows:

> The sample of steel window submitted by the Truscon Steel Company, of Youngstown, Ohio, for use in the construction of superstructures of Logan Fontenelle Homes Project, which shows the construction of sash, frame and screen as regards the side and top jamb, transom bar and sill, does not show Section E, shown on the Architectural drawings.
>
> Would it be possible for the Truscon Steel Company to submit a sample of a section taken from the center mullion of a twin window?

> This window has been approved subject to contract requirements, with the above exception, and with the notation that the transom bar drip should be so constructed that it will fit tightly to the side jambs or be welded together.

February 20, 1937, plaintiff submitted the additional part of the window requested and March 4, 1937, the Project Manager advised plaintiff further in part as follows:

> This sample is tentatively approved, subject to the contract requirements and pending submission of complete metal casement window and screen of a size required for the Logan Fontenelle Homes Project, which may be used in the work.

8. The sample window referred to in the preceding finding had thereon a single shop coat of paint but it was not submitted as a sample paint job. Prior to the submission of this sample window, namely, January 21, 1937, plaintiff submitted to the Project Manager a sample of paint for the shop coat on steel sash and was advised verbally by him that the paint might be manufacturer's standard shop paint and need not be tested. A sample of a section of a finished painted window 6 by 12 inches as required by the last specification set out in finding 4 was never submitted by plaintiff. While requests were made by the Project Engineer for the submission of such a sample, the record does not show whether the requests were made prior to the beginning of the controversy referred to in the succeeding findings.

9. Truscon delivered the windows during the period April to June 1937, and thereafter proceeded with their installation. In preparing the windows Truscon applied two coats of paint with a spray gun in lieu of "one heavy prime coat" as called for by the specifications. Prior to this time Truscon had had difficulty with rust and corrosion on material furnished with a shop coat of paint of one application and it applied the two coats in this instance in order to overcome that difficulty. As heretofore shown, the sample window referred to in finding 7 had only one application of paint.

The shop coat obtained by the two applications gave good coverage, was durable, and prevented rust and corrosion. However, it had an appearance which is characterized as

"orange peel." Its resemblance to an orange peel design results from the explosion of minute globules of paint which form as the paint emanates from the spray gun. The surface in this instance was generally smooth to the touch. The shop coats on the windows delivered contained the ordinary amount of runs and sags which were prohibited by the specifications in the finish coat but which are usually found in painting of this character. The sags and runs are customarily removed at the time of the application of the finish coat. In the controversy which ensued over the orange peel appearance, plaintiff offered no objections to having the sags and runs removed without additional cost to defendant.

10. When Hansen began applying the finish coats of paint their foreman called the Project Engineer's attention to the "orange peel" or "stippled" effect in the shop coat which was magnified when the finish coat of enamel called for by the specifications was applied to it. On examination of the windows on August 13, 1937, which was the first time he had seen the type of finished window proposed to be furnished by plaintiff, the Project Engineer advised Hansen's painting foreman that the shop coat was unsatisfactory and the painting foreman agreed with that conclusion. August 16, 1937, the Project Engineer sent the following communication to plaintiff:

> On Friday, August 13, 1937, inspected a sample metal window painted by your painting subcontractor.
> The finish of this window is not acceptable in that it gives the appearance of an orange peel finish.
> It is quite evident the shop coat is not in condition to receive finish enamel and no doubt it will be necessary for you to remove shop coat and any rust on material and refinish the frames in accordance with contract requirements.

11. Upon receipt of the letter referred to in the preceding finding and on the basis of oral discussions of its representatives with the Project Engineer, Truscon interpreted the Project Engineer's objections to mean that the shop coat would have to be removed in order to make the windows acceptable upon the application of the finish coat. However, the Project Engineer did not at any time specifically order the removal of the shop coat but did insist that a paint job

be given which in his opinion complied with the specifications. Truscon maintained that the specifications did not prohibit the orange peel appearance on the windows.

August 27, 1937, the Project Engineer asked the inspection division at Washington, D. C., to send a representative to inspect the windows in controversy. As a result an inspector (a Mr. Knudsen) came to the job and made his examination August 29 and 30, 1937. Knudsen advised plaintiff's representatives that approximately 50 or 60 percent of the windows were satisfactory but that additional work would be required on the other windows to make them acceptable. While there, Knudsen examined two windows on which corrective work had been done by Hansen's foreman and approved one of them as a sample. On one of these windows, that in an apartment on the ground floor of the fifth apartment from the east end in building 29-C, the greater part of the shop coat was removed by sanding and using lacquer thinner and glycerine, the time required for such work by Hansen's foreman being more than an hour. Two coats of enamel were then applied for Knudsen's inspection. On the other window, that on the ground floor in the fourth apartment from the east end in building 29-C, the same corrective method was followed but to a much less degree, only 15 or 20 minutes being consumed in the operation. The orange peel effect was much more apparent in the latter than in the former, but even in the former its effect could be seen on close examination. The purpose of having this work done on these two windows was to provide an approved sample which could be followed in the acceptance of the other windows.

12. After he left the job on August 30, 1937, a controversy developed as to whether Knudsen had approved the window in the fourth or the fifth apartment, plaintiff insisting on the former and the Project Engineer on the latter. Plaintiff was willing to proceed on the basis of the window in the fourth apartment but the Project Engineer declined to accept windows which conformed to that sample. At the time of Knudson's inspection, plaintiff or Truscon made some arrangement with Hansen to put the windows in satisfactory condition for the application of the finish coat

for 15 cents per window but later, when their foreman found how much time was required to make them acceptable to the Project Engineer, Hansen declined to carry out the arrangement. Hansen also declined to go forward with the application of the finish coat where the orange peel effect showed in the shop coat which was true of all windows on the project as originally delivered. Hansen did only a slight amount of painting on the casement windows during the period August 16 to October 30, 1937. Some friction existed between Hansen and Truscon, each blaming the other for the situation which had developed.

13. Truscon and plaintiff protested the ruling of the Project Engineer and insisted that the window which Knudsen had approved had some orange peel appearance, that it was the window in the fourth apartment, and that they were willing to do the necessary work to make the windows conform to that approved window. Insofar as appears from the record, no written protest was filed against the Project Engineer's ruling of August 16, 1937, until September 8, 1937, the protests being of an oral nature. On the latter date plaintiff filed a written appeal to the Director of Housing from the Project Engineer's ruling of August 16, 1937. On September 17, 1937, the Project Engineer advised plaintiff in writing that "windows were not acceptable when finished that gave the appearance of orange peel and that if necessary, shop coat should be removed and frames refinished in accordance with contract requirements," that the sample window approved by Knudsen was in the fifth apartment, and that "windows showing an orange peel finish will not be acceptable."

September 21, 1937, plaintiff's representatives took two windows from the project to Washington which they considered representative of the type of work they were willing to do. These windows were selected without the assistance of the Project Engineer in determining whether they were representative of the kind of work which he was requiring to be corrected. At the time of their visit to Washington, the Project Engineer advised the inspection division that these windows were not representative, that one of them had the best shop coat on the job, and that the other was in an

above average condition. At the time of this visit to Washington, plaintiff's representatives were advised verbally by the representatives of the Director of Housing that the window in the fourth apartment was the one which had been approved and that they would be furnished with a copy of a letter which would be written to that effect. A copy of such a letter was never furnished.

September 27, 1937, the Project Engineer confirmed in writing his statement of September 17, 1937, that the approved sample window was in the fifth apartment. October 1, 1937, plaintiff replied to that letter urging that it was the window in the fourth apartment which was approved by Knudsen. On October 5, 1937, the Project Engineer again confirmed his ruling of September 17, 1937.

14. During the latter part of September 1937 a special representative of Truscon (a Mr. Fitzpatrick) was sent to the job in an effort to make the windows satisfactory to the Project Engineer. He found that the orange peel effect could be removed by sanding the windows but that this was a very costly process and that a cheaper way to take care of the situation was to remove the entire shop coat from them and apply a new shop coat. He thereupon proceeded in that manner, and by October 30, 1937, had completed approximately 1,300 windows.

15. In the meantime plaintiff and Truscon were continuing their protests against the ruling of the Project Engineer, and insisting that the window which had been approved by Knudsen as a sample was in the fourth apartment. In a protest filed October 16, 1937, plaintiff advised the Director of Housing that it intended to comply with the requirements of the Project Engineer for the removal or treatment of the shop coat of paint on the windows, but that in the event it was ultimately determined that what he required was not proper it would make claim at the completion of the job for additional compensation for any damages sustained. Finally, on October 30, 1937, the Director of Housing ruled that the sample which had been approved was the window in the fourth apartment, his letter to plaintiff's counsel reading as follows:

> I have received your letter of October 27, pertaining to the above subject in connection with the superstructures of the Logan Fontenelle Homes Project, Omaha, Nebraska.
>
> The Contractor has been informed that the approved sample window is the one located in the living room of the fourth apartment from the east end of Building 29–C.

In reply plaintiff on November 4, 1937, wrote the Director of Housing as follows:

> We are assuming, in view of the instructions received from the Project Manager and your letter of October 30, 1937, to our attorneys, that the controversy between the Truscon Steel Company and the Project Engineer as regards the prime coat of paint on the steel windows, has been settled and determined, and that there will be no further delay to the construction of the Project as a whole because of such controversy. We are pleased that the question has been finally settled.
>
> For the reasons evident in the history of this matter and which are all before you, we now request your approval and allowance of an extension of a minimum of thirty days from the present completion date for the completion of this contract, and a waiver of the penalty provision of the contract for that exended period.

November 16, 1937, the contracting officer advised plaintiff that its "claim for an extension of time for a minimum period of 30 days is noted and it will be given consideration at the time the other claims that you have filed are reviewed." The "other claims" referred to requests for extensions of time for completion of the contract.

16. As shown in finding 14, during the controversy over whether Knudsen had approved the window in the fourth or the fifth apartment, Truscon had the shop coat removed on some 1,300 windows and a new shop coat applied thereto. Truscon had this work performed by a subcontractor at a cost to Truscon of $1,879.34 which included the amount paid its subcontractor plus traveling expenses and plus Truscon's overhead expense allocated to this work. The total cost was reasonable for the services performed. Truscon made claim against plaintiff for the payment of that amount. Reasonable overhead and profit to plaintiff on account of this item was $394.66.

17. During the period of the controversy little painting work was done on the windows by Hansen and this in turn delayed other work which had to follow the painting. However, entirely apart from this controversy, various matters contributed to the delay in the completion of the contract, some of which arose prior thereto. For example, on July 15, 1937, Hansen complained to plaintiff that their painting work was being delayed through no fault of their own and that they would require an extension of ninety days for their portion of the work. Friction existed among the subcontractors and from time to time subcontractors were complaining to plaintiff that the work was being delayed by other subcontractors. September 13, 1937, plaintiff advised the Project Engineer that all of its exterior doors had been cut too short and that unless it was permitted to do corrective work thereon which would make them acceptable it would require at least four months to get new doors, which would make a substantial delay in the ultimate completion of the project. The Project Engineer advised plaintiff that its request for acceptance of such doors with repair work done thereon was rejected and that the doors must be replaced with doors which would meet contract requirements.

Other instances, either on the part of the plaintiff or its subcontractors, arose from time to time which were not connected with the paint controversy over the windows and which tended to delay the ultimate completion of the contract.

18. August 23, 1938, plaintiff filed a claim with the United States Housing Authority on behalf of Truscon for work and labor performed and material furnished pursuant to an alleged "unjustified interpretation of the specifications in connection with the painting of steel windows." At or about the same time, plaintiff made a claim on a similar ground on behalf of Hansen, and also a claim on its own behalf on the ground that such an interpretation delayed the "final completion of the contract a minimum of thirty days" and thereby increased its cost. At the same time, plaintiff executed the voucher for final settlement but excepted therefrom the claims involved in this proceeding.

19. What action, if any, the United States Housing Authority took on the claims does not appear in the record.

However, on July 14, 1939, the Comptroller General denied the claims on the ground that the Project Engineer "acted within the scope of his authority in making the decisions in question." On a review of that decision the Comptroller General affirmed his previous action. In taking the latter action the Comptroller General made the following statements:

> * * * Numerous extensions in contract time aggregating 99 calendar days, were authorized and granted under change orders Nos. 16, 28, 44, 46, and 49, thus increasing the period established for complete performance under the said contract to 444 days. The evidence of record indicates that notification to proceed was received by you under date of December 7, 1936, thereby fixing February 24, 1938, as the final completion date thereunder. It has been administratively reported that the project was completed and accepted under date of February 22, 1938, and that maintenance thereof was assumed by the Government as of that date. Full and complete payment of the contract price, as modified by the various change orders, has been made to you except, of course, for certain minor deductions made pursuant to the terms thereof.

What modifications were made in the contract by the change orders or the basis of the change orders is not shown by the record. Likewise what delay, if any, in the ultimate completion of the contract may be attributed to the controversy over painting the windows is not satisfactorily shown by the record.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case involves the interpretation of the specifications of a contract. The main facts in the case are not in dispute.

It appears that the plaintiff had a contract with the Government for the construction of the superstructure for a housing project in Omaha, Nebraska. The contract and specifications required the plaintiff to furnish and install metal casement windows. The specifications in regard to these windows provided:

> Windows, metal window trim, and screen frames, before leaving the factory, shall be given *one heavy prime coat of paint*. Paint shall be guaranteed by the window manufacturer to provide a satisfactory base for subsequent coats of paint specified. [Italics ours.]

A quick-drying synthetic interior metal enamel was specified as a subsequent coat for the interior of the windows. This paint had a tendency to magnify any defects in the shop coat of paint.

Plaintiff subcontracted for the metal casement windows and also for the shop coat painting. The finish painting was also subcontracted by plaintiff.

Instead of plaintiff's subcontractor applying one heavy prime coat of paint, as specified by the contract, he applied two coats with a spray gun. This method formed a good coverage but left an "orange peel" appearance. This "orange peel" appearance was caused by the explosion of minute globules of paint which formed as the paint emanated from the spray gun. When the finish coat of paint was applied over these two coats of paint, it magnified the "orange peel" appearance.

The plaintiff did not furnish a sample of a fully painted window, as was required by the specifications, prior to the delivery and installation of the windows and the beginning of the application of the finish coat of paint.

When this matter was called to the attention of the Project Engineer, the plaintiff was notified that the shop coat of paint was unsatisfactory, and that the windows which had been treated with the spray gun method would have to be done over by the removal of the shop coat in order to conform to the terms of the contract.

After several attempts to arrive at a method which would be satisfactory to the Project Engineer and the plaintiff, whereby the plaintiff would be saved from a substantial additional expense, it was determined that defendant would accept windows without the removal of the entire shop coat provided plaintiff would do certain work on the windows by sanding them and applying lacquer and glycerine. In the meantime plaintiff had removed the entire shop coat on approximately 1,300 windows and applied a new shop coat at a cost of $1,879.34. Plaintiff seeks to recover that amount.

The whole cause of the expense in question was due to the fact that plaintiff's subcontractor did not comply with the terms of the specifications, which provided for the application of one heavy prime coat of paint guaranteed to provide a satisfactory base for the subsequent coat of paint specified.

This case is distinguished from the situation involved in *Struck Construction Co.* v. *United States*, 96 C. Cls. 186, where the plaintiff followed the defendant's directions not only in the materials to be used but also in the method of their use, but was unable to satisfy the defendant with the results. We held that the defendant had been unreasonable in its demands under the specifications. In the instant case the plaintiff failed to do the work in accordance with the specifications. Recovery of the additional expense claimed is accordingly denied.

The further claim for damage for delay due to the controversy must also be denied. The extensions of time requested were granted and the contract completed within the time limit as extended by the requests. No liquidated damages were assessed. The record does not justify any other allowance to plaintiff.

The petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge*, took no part in the decision of this case.

THE COCA-COLA COMPANY v. THE UNITED STATES

[No. 45226. Decided June 5, 1944]

On the Proofs

Income tax; credit for foreign taxes paid by subsidiary, limitations on.—The purpose of subsection (f) of section 131 of the Revenue Act of 1932 (47 Stat. 169, 211), is to give a domestic corporation credit for that part of the foreign taxes paid by its foreign subsidiary on the income from which the dividend was paid in the ratio of the dividend paid to the accumulated profits on which the foreign taxes were levied; and it was the further purpose to limit this credit so that it would not exceed the

amount of the United States taxes that would have been paid by the parent company had the income, received by it in the form of dividends, been derived from sources within the United States.

Same.—Under section 131 of the Revenue Act of 1932, credit for foreign taxes paid by a subsidiary of a domestic corporation is in the ratio of the accumulated profits of the subsidiary to the dividend paid by it out of those profits; and the limitation placed on the credit depends on the ratio of the dividends received by the parent corporation in the taxable year to the entire net income of the parent corporation in that year, applied to the tax paid by the parent corporation for that year.

Same.—In computing the limitation as to the credit for foreign taxes paid by a subsidiary, under section 131 (f) of the Revenue Act of 1932, the subsidiary's income for any taxable year is immaterial, because the sole purpose of the limitation is to prevent the dividend income from being taxed at a lesser rate than the domestic corporation's other income.

Same.—Where no dividend was received by the parent corporation from its foreign subsidiary in the years 1930, 1931, or 1932, the statute (47 Stat. 169,211) does not justify the application of the ratio of any part of the subsidiary's profits in those years to the parent company's profits for the taxable year 1933.

Same; purpose of statutory ratio fixing limitation.—The statutory ratio is dividends to the entire net income in which the dividends are included, the purpose being to prevent the dividend income from being taxed at a lesser rate than the other income of the parent corporation.

Same; purpose of provision for credit is to prevent double taxation.—The purpose of the provision for credit was to prevent double taxation. *American Chicle Co.* v. *United States*, 316 U. S. 450; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1.

The Reporter's statement of the case:

Mr. John E. McClure for the plaintiff. *Mr. O. H. Chmillon*, *Miss Maude Ellen White*, *Messrs. Miller & Chevalier*, and *Spaulding*, *Sibley & Troutman*, were on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Fred K. Dyar* was on the brief.

The court made special findings of fact as follows, upon a stipulation of facts by the parties:

1. Plaintiff, The Coca-Cola Company, at all times material was a domestic corporation organized on September 11, 1919, and existing under the laws of the State of Delaware.

Its corporate office and principal place of business is located at Wilmington, Delaware. The business of The Coca-Cola Company and its subsidiaries and affiliates is that of manufacturing, selling, bottling, distributing and marketing of a syrup and soft drink, both under the trade-mark "Coca-Cola."

2. The plaintiff herein in its petition sought to recover from the United States of America the sum of $78,509.23 with interest thereon as provided by law from December 14, 1934, which amount represents Federal income and excess-profits taxes paid by plaintiff to the Collector of Internal Revenue for the taxable year ending December 31, 1933, and which amount is still retained by the United States. The amount now in controversy is $41,832.89 plus the interest thereon.

3. On March 15, 1934, the plaintiff filed with the Collector of Internal Revenue for the District of Delaware, its income tax return on Form 1120 for the taxable year ending December 31, 1933, showing an income tax of $1,436,118.60, plus an excess-profits tax of $87,173.46. Said tax in the amount of $1,523,292.06 was duly paid to the Collector of Internal Revenue for the District of Delaware as follows: On March 15, 1934, $380,823.02; June 13, 1934, $380,823.01; September 8, 1934, $380,823.01; and December 15, 1934, $380,823.02.

4. Plaintiff in its income tax return for the taxable year 1933 signified its desire to have the benefits of section 131 of the Revenue Act of 1932 applied in the determination of its tax liability for said year.

5. At all times during the calendar year 1933, and prior thereto, plaintiff owned all of the authorized and outstanding stock of The Coca-Cola Company of Canada, Ltd., Toronto, Canada, a foreign corporation. Plaintiff and The Coca-Cola Company of Canada, Ltd., at all times material hereto have kept their books and filed their income tax returns on the accrual basis of accounting. Their taxable year was the calendar year. During 1933 plaintiff received from The Coca-Cola Company of Canada, Ltd., dividends which were not deductible under section 23 (p) of the Revenue Act of 1932, as follows:

On March 28, 1933	$4, 529, 290. 32	(Canadian currency)
On November 23, 1933	1, 899, 911. 30	(Canadian currency)
Total	6, 429, 201. 62	(Canadian currency)

Less than 50 per centum of the gross income of The Coca-Cola Company of Canada, Ltd., for the three-year period ending with the close of its taxable year preceding the declaration of said dividends was derived from sources within the United States as determined under section 119 of the Revenue Act of 1932.

6. The aforesaid dividends of $6,429,201.62 were paid out of the accumulated profits of The Coca-Cola Company of Canada, Ltd., on which it paid Canadian income taxes, both Dominion and Provincial.

7. The aforesaid dividends of $6,429,201.62 (Canadian currency) received by plaintiff from The Coca-Cola Company of Canada, Ltd., were included in said plaintiff's Federal income tax return for the year 1933, under Item 11 "Dividends on Stock of Foreign Corporations." With said return, and as a part thereof, plaintiff filed Treasury Department Form 1118 "Claim for Credit on Corporation Income Tax Return for Taxes Paid or Accrued to a Foreign Country or a Possession of the United States" and the supporting evidence required by said Form. On said Form and in its Federal income tax return plaintiff claimed a credit of $694,233.42, under the provisions of section 131 (f), Revenue Act of 1932, for Canadian income taxes paid by The Coca-Cola Company of Canada, Ltd. Said return showed a total income tax of $2,130,352.02, less the foreign tax credit claimed as above under section 131 (f), Revenue Act of 1932, of $694,233.42, leaving a net income tax due to the United States of $1,436,118.60, plus an excess-profits tax of $87,173.46, or a total of $1,523,292.06.

8. On December 11, 1936, the plaintiff filed with the Collector of Internal Revenue for the District of Delaware, on Treasury Department Form 843, a claim for refund in the amount of $61,039.06, representing the amount of taxes and interest which the plaintiff alleged it had overpaid for the taxable year ending December 31, 1933. A copy of said claim for refund is attached to the petition as Exhibit 1.

9. On August 6, 1938, plaintiff filed with the Collector of Internal Revenue for the District of Delaware on Treasury Department Form 843 claim for refund of income and excess-profits taxes in the amount of $63,200.77, representing the amount of taxes alleged to have been overpaid for the taxable year ending December 31, 1933. A copy of said claim is attached to the petition as Exhibit 2.

10. On June 14, 1939, the plaintiff filed with the Collector of Internal Revenue for the District of Delaware on Treasury Department Form 843 a claim for refund of income and excess-profits taxes in the amount of $84,841.57, representing the amount of taxes alleged to have been overpaid for the taxable year ending December 31, 1933. A copy of said claim is attached to the petition as Exhibit 3.

11. The Commissioner in re-examining plaintiff's income tax return for the taxable year 1933, redetermined plaintiff's credit for foreign taxes deemed to have been paid by it under section 131 (f), Revenue Act of 1932, to be $709,692.89 as set forth in his letter of June 6, 1939, addressed to the plaintiff, a copy of which is attached to the petition as Exhibit 4. As a result of adjustments (not now in controversy), an overpayment of income and excess-profits tax of $5,562.46 resulted and now has been refunded to the plaintiff by the United States. In determining said foreign tax credit under section 131 (f), Revenue Act of 1932, as $709,692.89, the Commissioner followed in principle a "new" Form 1118 (revised). A copy of said form is attached to the petition marked Exhibit 5. A copy of the actual computation of the foreign tax credit of $709,692.89 by the Commissioner of Internal Revenue is set forth as Exhibit A to the Commissioner's letter of June 6, 1939, attached to the petition as Exhibit 4.

12. The Commissioner in making his original computation determined that the amount of $5,109,608.00, representing the fair market value of the 30 shares of stock of Rohawa Company which was distributed by The Coca-Cola Company of Canada, Ltd., to plaintiff in 1931, constituted a taxable dividend from a foreign corporation and treated the same as a distribution out of the Canadian Company's accumulated profits, thus reducing the 1931 profits, eliminating the 1930

and 1929 profits, and reducing the 1928 profits of that company.

The parties have stipulated as follows: "In the case of *The Coca-Cola Company* v. *United States*, Court of Claims #45208, decided October 5, 1942 (97 C. Cls. 241), it has been finally determined that the transaction by which the 30 shares of stock of the Rohawa Company came to plaintiff was a nontaxable reorganization within the meaning of the statute and that the transfer of the Rohawa Company stock by the Canadian Company to plaintiff was not subject to tax.

"If the Court should determine that under section 112 (h) of the 1928 and 1932 Revenue Acts, said 30 shares of stock of Rohawa Company was a distribution in pursuance of a plan of reorganization, by a corporation a party to a reorganization, of stock in a corporation a party to the reorganization, on which no gain to the distributee from the receipt of such stock was recognized by law, then said distribution is not to be considered a distribution of earnings or profits within the meaning of section 115 (b) for the purpose of determining the taxability of subsequent distributions by the Canadian Company. But even if the Court should so determine, the defendant does not by this stipulation concede that the plaintiff is entitled to a recovery based upon this ground for the reason that the defendant reserves the right to contend that the ground is not covered by a sufficient and timely claim for refund filed by the plaintiff.

"If the Court should so determine, then attached Joint Exhibit 3 [set out in finding 13] shows the computation of The Coca-Cola Company's 1933 credit for foreign income taxes, computed after eliminating said distribution of stock. The plaintiff claims, however, that the formula used by the Commissioner and in the attached Joint Exhibit 3[set out in finding 13], in computing its foreign tax credit and in particular the amounts shown as Items 12 to 15, inclusive, are incorrect. * * *"

13. The defendant's computation of the foreign tax credit to which plaintiff is entitled, after eliminating the Rohawa distribution of stock, is as follows:

The Coca-Cola Company—year 1933, computation of credit for foreign income taxes paid after eliminating the Rohawa Company stock distribution

	1930	1931	1932	1933	Total
1. Dividends received from Canadian Company in Canadian currency:					
March 28, 1933		$1, 942, 657. 95	$2, 105, 943. 73	$480, 688. 64	$4, 529, 290. 32
November 23, 1933	$410, 361. 23	148, 093. 41		1, 341, 456. 66	1, 899, 911. 30
Totals	410, 361. 23	2, 090, 751. 36	2, 105, 943. 73	1, 822, 145. 30	6, 429, 201. 62
2. Entire net income of domestic corporation—U. S. currency					15, 542, 147. 25
3. Total United States income tax—U. S. currency					2, 137, 045. 25
4. Dividends paid out of accumulated profits	410, 361. 23	2, 090, 751. 36	2, 105, 943. 73	1, 822, 145. 30	
4A. Item 4 in U. S. currency (Ex. A-1)	420, 153. 41	1, 775, 965. 86	1, 760, 868. 91	1, 775, 390. 69	
5. Total profits before taxes were deducted	2, 573, 316. 14	2, 828, 183. 30	2, 439, 669. 39	2, 391, 904. 82	
6. Accumulated profits	2, 326, 271. 13	2, 490, 751. 36	2, 105, 943. 73	2, 040, 132. 00	
7. Tax accrued on total profits	247, 045. 01	337, 431. 94	333, 725. 66	351, 772. 82	
8. Ratio of accumulated profits to total profits (6÷5)	90. 3997%	88. 06895%	86. 32086%	85. 29319%	
9. Tax paid on accumulated profits (7×8)	$223, 327. 95	$297, 172. 77	$288, 074. 86	$300, 038. 26	
10. Ratio of dividends received to accumulated profits (4÷6)	17. 6403%	83. 9406%	100%	89. 3151%	
11. Taxes deemed to have been paid (9×10)	$39, 395. 72	$249, 448. 61	$288, 074. 86	$267, 979. 47	
11A. Item 11 in U. S. currency (Ex. A-1)	$40, 468. 82	$210, 563. 51	$239, 147. 07	$261, 346. 38	
12. Ratio of dividends received to entire net income (4A÷2)	2. 7033%	11. 4268%	11. 3296%	11. 4231%	
13. Limitation on tax payments deemed to have been paid by domestic corporation (3×12)	$57, 770. 74	$244, 195. 89	$242, 118. 68	$244, 116. 82	
14. Amounts of tax payments deemed to have been paid by domestic corporation (smaller of 11A or 13)	$40, 468. 82	$210, 563. 51	$239, 147. 07	$244, 116. 82	
15. Total of item 14					734, 296. 22

14. Plaintiff's computation of the foreign tax credit to which it claims it is entitled is as follows:

The Coca-Cola Company—year 1933, taxpayer's computation of credit for foreign income taxes paid

	1930	1931	1932	1933	Total
1. Dividends received from Canadian Company in Canadian currency:					
March 28, 1933		$1,942,657.95	$2,105,943.73	$$480,688.64	$4,529,290.32
November 23, 1933	$410,361.23	$148,093.41		$1,341,456.66	$1,899,911.30
Totals	$410,361.23	$2,090,751.36	$2,105,943.73	$1,822,145.30	$6,429,201.62
Dividends received in U. S. currency					$5,732,378.87
2. Entire net income of domestic corporation—U. S. C.					$15,542,147.25
3. Total United States income tax—U. S. C.					$2,137,045.25
4. Dividends paid out of accumulated profits	$410,361.23	$2,090,751.36	$2,105,943.73	$1,822,145.30	
5. Total profits before taxes were deducted	$2,573,316.14	$2,828,183.30	$2,439,669.39	$2,391,904.82	
6. Accumulated profits	$2,326,271.13	$2,490,751.36	$2,105,943.73	$2,040,132.00	
7. Tax accrued on total profits	$247,045.01	$337,431.94	$333,725.66	$351,772.82	
8. Ratio of accumulated profits to total profits (6÷5)	90.3997%	88.06895%	86.32086%	85.29319%	
9. Tax paid on accumulated profits (7×8)	$223,327.95	$297,172.77	$288,074.86	$300,038.26	
10. Ratio of dividends received to accumulated profits (4÷6)	17.6403%	83.9406%	100%	89.3151%	
11. Taxes deemed to have been paid (9×10)	$39,395.72	$249,448.61	$288,074.86	$267,979.47	
11A. Item 11 in U. S. currency (Ex. A-1)	$40,468.82	$210,563.51	$239,147.07	$261,346.38	$751,525.78
12. Ratio of dividends received to entire net income (1÷2)					.368828
13. Limitation on tax payments deemed to have been paid by domestic corporation (3×12)					$788,202.13
14. Amount of tax payment deemed to have been paid by domestic corporation (smaller of 11A or 13)					$751,525.78

The Coca-Cola Company—year 1933, taxpayer's schedule of dividends and taxes in U. S. currency

	1930	1931	1932	1933	Total
Dividends paid and received:					
Dividends paid in Canadian money—Item 1—Exhibit A:					
March 28, 1933		$1,942,657.95	$2,105,943.73	$480,688.64	$4,529,290.32
Percent to total		42.89100	46.49611	10.61289	100%
November 23, 1933	$410,361.23	$148,093.41		$1,341,456.66	$1,899,911.30
Percent to total	21.59897	7.79475		70.60628	100%
Total	$410,361.23	$2,090,751.36	$2,105,943.73	$1,822,145.30	$6,429,201.62
Dividends received in U. S. currency—Items 1 and 4—Exhibit A:					
March 28, 1933		$ 1,624,338.72	$ 1,760,868.91	$ 401,924.21	$ 3,787,131.84
November 23, 1933	$420,153.41	151,627.14		1,373,466.48	1,945,247.03
Total	$420,153.41	1,775,965.86	1,760,868.91	1,775,390.69	5,732,378.87
Taxes paid:					
Taxes deemed paid in Canadian money—Item 11—Exhibit A	$39,395.72	$ 249,448.61	$ 288,074.86	$ 267,979.47	
Percent to total dividends paid:					
March 28, 1933		92.91674%	100%	26.38037%	
November 23, 1933	100%	7.08326%		73.61963%	
Total	100%	100.00000%	100%	100.00000%	
Taxes deemed paid in Canadian money converted to U. S. currency:					
On March 28, 1933, dividend		$231,779.52	$288,074.86	$70,693.98	
U. S. currency at .830156		192,413.16	239,147.07	58,687.02	$490,247.25
On November 23, 1933, dividend	$39,395.72	17,669.06		197,285.49	
U. S. currency at 1.027239	40,468.82	18,150.35		202,659.36	261,278.53
Total taxes deemed paid in U. S. currency	40,468.82	210,563.51	239,147.07	261,346.38	751,525.78

15. Prior to 1930 the consistent practice of the Commissioner was to determine the credit allowable under Section 131 (f), Revenue Act of 1928, and corresponding provisions of prior Revenue Acts, in accordance with the method shown in the old Treasury Department Form 1118, Exhibit 6 of the petition.

Beginning in 1930, the consistent practice of the Commissioner was to determine the credit allowable under Section 131 (f) of the Revenue Act of 1928 and corresponding provisions of other Revenue Acts, in accordance with the method shown in a new Form 1118. Under both the old form 1118 and new form 1118 the foreign tax credit was computed by the Commissioner in the manner set forth in plaintiff's computation, set out in finding 14 above.

In 1938 the Commissioner first began to compute the foreign tax credit as shown in his computation, which is set out in finding 13 above.

16. On August 31, 1939, the Commissioner of Internal Revenue, in accordance with the provisions of section 3772, chapter 37, of the Internal Revenue Code, notified plaintiff by registered mail that the remainder of its claims for refund, filed as aforesaid, was rejected. A copy of said notice is attached to the petition marked Exhibit 7.

17. Plaintiff is entitled to a credit for foreign taxes paid of $751,525.78.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

In the year 1933 the plaintiff, incorporated under the laws of Delaware, owned all of the stock of The Coca-Cola Company of Canada, Ltd. In that year it received from its Canadian subsidiary dividends of $6,429,201.62 in Canadian currency. In United States currency this amounted to $5,732,378.87.

The question presented is the credit to which plaintiff is entitled for foreign taxes paid by its subsidiary on the earnings out of which these dividends were paid.

Section 131 of the Revenue Act of 1932 (47 Stat. 169, 211, 212) allows a taxpayer a credit against taxes due the United States of the amount of income, war-profits, and excess-

profits taxes paid or accrued to a foreign country. Subdivision (f) of that section reads in pertinent part as follows:

> For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends * * * in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country * * * upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided*, That the amount of tax deemed to have been paid under this subsection shall in no case exceed the same proportion of the tax against which credit is taken which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included, * * * and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. * * *

Acting pursuant to the authority granted by this subsection, the Commissioner computed the foreign tax credit to which plaintiff was entitled at $709,692.89. In doing so, he treated the value of 30 shares of stock in the Rohawa Company, which plaintiff received in 1931 from its Canadian subsidiary, as a taxable distribution. However, in the case of *The Coca-Cola Co.* v. *United States*, 97 C. Cls. 241, 47 F. Supp. 109, we decided that plaintiff received these shares of stock in a nontaxable reorganization, and that plaintiff was not required to include the value of them in its gross income for income tax purposes.

The defendant does not dispute the correctness of this decision and agrees, subject to the reservation mentioned below, that the foreign tax credit should be recomputed in the manner set out in finding 13. As so computed the plaintiff is entitled to a foreign tax credit of $734,296.22.

As originally computed, the defendant had treated the dividends as having been paid out of the income for 1933, 1932, 1931, 1928, and 1927. The elimination of the value of the stock of the Rohawa Company from dividends paid out of earnings results in a determination that the dividends received in 1933 were paid out of earnings for the years 1933, 1932, 1931, and 1930, as shown in finding 13. In defense of its former computation the defendant merely suggests the idea that plaintiff may not be entitled to claim a credit in excess of $709,692.89, since in its claim for refund it did not expressly claim that the dividends paid in 1933 were paid out of earnings for the years 1930, 1931, 1932, and 1933. There is nothing in this suggestion, because at the time plaintiff filed its claim for refund the defendant had not made the assertion that the distribution of the Rohawa shares of stock was a taxable dividend, and, therefore, that the dividend paid in 1933 was attributable to any years other than 1930, 1931, 1932, and 1933; and plaintiff in its claim for refund computed its foreign tax credit upon the basis that the dividends were paid out of the income for these four years.

We hold, therefore, that plaintiff is entitled to a foreign tax credit of not less than $734,296.22.

This brings us to the question of the proper computation of the limitation on the amount of the credit for taxes deemed to have been paid the foreign country, as set out in the proviso to section 131 (f).

The parties are in agreement that the total amount of taxes deemed to have been paid is $751,525.78. However, they disagree as to the limitation placed by the proviso on the amount of the credit which can be taken. The taxpayer computes this limitation by applying to the taxes paid by the domestic corporation the ratio of the dividends received to the entire net income in which they are included. The defendant divides up "the amount of such dividends" into four parts: (1) the part deemed to have been paid out of 1930 accumulated earnings; (2) the part deemed to have been paid out of 1931 accumulated earnings; (3) the amount deemed to have been paid out of 1932 accumulated earnings; and (4) the amount deemed to have been paid out of 1933 accumulated earnings. It then ascertains the ratio of each of these com-

ponent parts to plaintiff's total net income for the year 1933, and it applies these ratios to the tax paid by the domestic corporation for the year 1933. In three of the years the limitation was greater than the amount of the tax deemed to have been paid, but in the year 1933 it was less by $17,229.56. Accordingly, the Commissioner of Internal Revenue reduced by this amount the credit for foreign taxes paid.

The purpose of subsection (f) seems plain: it is to give the domestic corporation credit for that part of the foreign taxes paid by its subsidiary on the income from which the dividend was paid in the ratio of the dividend paid to the accumulated profits on which the foreign taxes were levied; then it was its further purpose to limit this credit so that it would not exceed the amount of the United States taxes that would have been paid by the parent company had the income, received by it in the form of dividends, been derived from sources within the United States.

In other words, it was intended that a domestic corporation receiving dividends and paying taxes on them to the United States should be entitled to a credit of the proportionate part of the taxes its subsidiary had paid to a foreign country on the accumulated profits out of which the dividends had been paid; but if the taxes paid to the foreign country with respect to the accumulated profits out of which the dividends were paid were greater than the taxes which the American corporation would have paid to the United States on income earned in the United States in an amount equivalent to the dividends received from the subsidiary, then the credit was to be limited to the amount of taxes payable to the United States on such income.

This being the purpose, Congress logically provided, in the first instance, that the credit for foreign taxes paid should be in the ratio of the accumulated profits of the subsidiary to the dividend paid by it out of those profits; but when it came to place a limitation on the credit, it made this depend on the ratio of the dividends received by the parent corporation in the taxable year to the entire net income of the parent corporation in that year, applied to the tax paid by the parent corporation for that year.

Congress dealt with two ratios in this subsection. The first was the ratio of the dividend paid by the subsidiary to the accumulated income of the subsidiary out of which it was paid. This ratio was applied to the taxes paid by the subsidiary. The second was the ratio of the dividends received by the parent company to the parent company's entire income for the year in which the dividends were received. This ratio was applied to the tax paid by the parent company to the United States.

In computing the limitation, the subsidiary's income for any taxable year was immaterial, because the sole purpose of the limitation was to prevent the dividend income from being taxed at a lesser rate than the domestic corporation's other income.

This limitation clause provides that the credit is limited to the proportion of the tax paid by the parent company "which the amount of such dividends" bears to the entire net income of the parent company in which such dividends are included. No dividend was received by the parent company in 1930 or 1931 or 1932. There is, therefore, no justification in the proviso for applying the ratio of any part of the subsidiary's profits in those years to the parent company's profits for the taxable year. The statutory ratio is dividends to entire net income in which the dividends are included. No other ratio is authorized. None other would have been logical because it was a ratio to be applied to the parent company's tax for the year in which the dividends were included in its income, for the purpose of preventing the dividend income from being taxed at a lesser rate than other income.

The taxpayer has followed literally the words of the proviso. It has applied the ratio of (1) "the amount of such dividends" to (2) "the amount of the entire net income of the domestic corporation in which such dividends are included" to (3) "the tax against which the credit is taken." On the contrary, the Commissioner of Internal Revenue entirely disregards the ratio fixed by the statute, and takes the ratio of that part of the dividend paid out of the subsidiary's accumulated earnings for each of the years in which the dividend was earned by the subsidiary to the parent company's entire net income for the taxable year. There is no justification for this.

The ratio of dividends to entire net income applied to the tax paid by the domestic corporation equals $788,202.13, which exceeds by $36,676.35 the foreign tax of $751,525.78 deemed to have been paid by plaintiff. The Commissioner of Internal Revenue has allowed a credit against United States taxes of only $734,296.22 of this amount. This has resulted in the taxpayer's paying on the same income $17,229.56 to both the Canadian Government and to this Government. The purpose of the provision for the credit was to prevent double taxation; *American Chicle Co.* v. *United States*, 316 U. S. 450; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1.

Beginning with the year 1921 the various revenue acts have contained substantially the same provision as that found in section 131 (f), and ever since 1921 until the year 1938 the Commissioner of Internal Revenue has computed the limitation provision of the Act in the manner insisted upon by plaintiff. This was over a period of 17 years. Not until form No. 1118 (revised) was adopted in 1938 did the Commissioner come to the conclusion that in all prior years this limitation had been improperly applied. We are of opinion that it had been correctly applied, and that the revision of the computation thereof in 1938 was improper.

We are of opinion that the plaintiff is entitled to recover the sum of $41,832.89, with interest thereon as provided by law from December 15, 1934. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

E. R. P. SMITH v. THE UNITED STATES

[No. 44759. Decided June 5, 1944]

On the Proofs

Rental of machine by Government for Civil Works Administration project; insufficient evidence.—Where the Government rented from the plaintiff a road machine for use on a Civil Works Administration project under an agreement that payment of rental would be made, on a pay roll basis, to the operator of

the machine, and not to the owner; and where the plaintiff agreed to and acquiesced in this method of payment; and where the evidence does not show to whom the payments, if any, were made during the period covered by the instant claim; it is *held* that it was the plaintiff's responsibility to know who the operator was and to obtain from him the plaintiff's part of the pay, and the plaintiff is not entitled to recover from the Government what he may have failed to collect from the operator of the machine.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff. *Mr. James R. Murphy* was on the briefs.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a road contractor, living in Hyattsville, Maryland.

2. During the period from May 21, 1934, to September 30, 1934, there was used by the United States Government, on its experimental farm at Beltsville, Maryland, for an aggregate of 604½ hours, a ⅝-cubic yard gasoline Keystone shovel with ditching attachment belonging to plaintiff. Plaintiff furnished the operator. The work on which the machine was engaged on the farm was road construction, under an appropriation for the activities of the United States Civil Works Administration. There was no written contract of hire.

3. At the time of the allotment of funds of the Civil Works Administration to these improvements at Beltsville the Government was endeavoring to give remunerative employment to persons then on relief rolls, and to accomplish this with the least possible delay.

The officer in charge of the improvements was the superintendent of the United States Animal Husbandry Station, Department of Agriculture, there located. This officer's letter of authorization from the Department of Agriculture, dated January 25, 1934, was as follows:

> In accordance with federal Civil Works Administration rules and regulations Nos. 4, 8, and 9 revised, supplement of rules and regulations No. 9, paragraph 2, you

are hereby designated as certifying officer to certify to the correctness of all pay rolls and vouchers covering supplies and materials purchased for Project 13 "Planning and development of land, drainage, roads, fencing, sewage, seeding, etc." You are further designated as purchasing agent for material and supplies to the limit of the restrictions specified in the approval of the project, namely, $54,500.

4. February 12, 1934, the State Civil Works Administrator for Maryland issued the following directive:

> Any individual who agrees to furnish to the local Civil Works Administration the services of himself and his equipment (and operating supplies for such equipment) may be paid for such services on a pay roll form. Such pay roll should indicate the project on which the person is employed and should also bear the legend "Truck, Team, and Equipment Pay Roll." The person involved must not be carried on the regular project pay roll drawn up to cover salaries of persons furnishing only their services or labor. It is not necessary that he be the owner of the equipment, it being sufficient that the individual who is certified for payment is the party who furnished his services and the services of his equipment in his possession.
>
> Where the local Civil Works Administration has knowledge to the effect that the person they are employing is not the actual owner of the equipment, the owner should be informed that while he may have an agreement with the operator, or driver, for loan or rental, such agreement constitutes no claim against the United States Government insofar as the United States Government is concerned, or any part of the money earned by the operator. The operator whom the Civil Works Administration is employing is considered as being in the same class as a carpenter and his tools, or a plumber and his equipment, who is being employed. Through his employment he becomes a Federal employee and as such, wages or monies paid him are not subject to levy, seizure, or the claims of creditors.

5. The "Truck, Team, and Equipment Pay Roll," authorized in the directive of February 12, 1934, was set up at Beltsville. Road construction equipment was necessary to accomplish the designed improvements and under the superintendent's direction inquiries were made about such equipment and offers solicited in the neighborhood for its use.

Plaintiff, during the period in question, had registered on the relief rolls and worked for two months on the project as a foreman. He was invited to and did submit an offer to the Animal Husbandry Division, Department of Agriculture, at Beltsville for the use of his Keystone shovel with operator, referred to in Finding No. 2 herein. He made his offer in writing on or about February 26, 1934, $370 per month for the shovel and ditching attachment and $1.10 per hour for the operator.

There were further negotiations with plaintiff which ended in the hiring by the defendant from plaintiff of shovel and operator at an agreed rate of $4.25 per hour, without the formality of a written contract, and shovel and operator were placed upon the "Truck, Team, and Equipment Pay Roll."

The first operator so furnished by plaintiff was one W. H. Pease, who served only part of the 604½ hours of use and service. The evidence does not disclose the identity of his successor or successors.

6. The defendant has paid for the shovel and operator and other expenses of operation at least the following amounts:

To W. H. Pease, 132 hours at $4.25 per hour	$561.00
To E. R. P. Smith (plaintiff)	561.00
To W. H. Pease, 382 hours at $1.10 per hour	420.20
To Unknown Operator, 67 hours at $1.10 per hour	73.70
Repairs, gas, and oil paid by the United States	271.55
Total	1,887.45

7. Under the regulations of the Civil Works Administration in the State of Maryland payment for work done by operator and equipment was to be made to the operator, regardless of ownership of the equipment. As stated in finding 5, W. H. Pease was not the only operator of the shovel, and the identity of the other operator or operators, to whom payment would, under the regulations, have been made, is not disclosed. It is not proved why part of the payments were made directly to plaintiff. The defendant's Exhibit D, Federal Civil Works Administration Supplementary Instructions number 3, issued November 24, 1933,

seems to show that payments were made weekly to persons on the Civil Works Administration pay roll.

The plaintiff worked as a foreman on the project a part of the time and hired out to the defendant for work on these improvements another machine with operator besides the one involved in this suit. The practice followed with regard to that machine was that on being paid by the defendant for both machine and personal services the operator indorsed his check over to plaintiff, and plaintiff paid back to the operator whatever had been agreed upon between the two. Plaintiff knew that payments for hire of machine and operator were being made to the operator by the defendant regardless of whether he owned the machine, and acquiesced in this practice.

It is not possible to determine with a reasonable degree of certainty whether or not full payment for shovel and operator, at the rate of $4.25 per hour, has already been made by the defendant to the agreed parties.

The court decided that the plaintiff was not entitled to recover.

Madden, *Judge*, delivered the opinion of the court:

The plaintiff sues for a balance which, he asserts, has not been paid him for the rental of his power shovel for use on a Civil Works Administration project at Beltsville, Maryland. The project consisted of road building and other activities on a Department of Agriculture Experiment Station. It was a relief project, designed to give employment to persons on relief rolls. Because of the greater accomplishment which could be produced by combining a certain amount of mechanical equipment with the hand labor, machines such as the plaintiff's shovel were hired. In order, apparently, to give the impression that practically all of the civil works money was being paid for personal labor, which was the primary object of the Civil Works Administration, rather than for material and the use of equipment, a pay roll called the Team, Truck, and Equipment pay roll was used in addition to the regular labor pay roll.

The operator of a rented machine was placed on this pay roll, and he was paid the entire amount of the agreed rent for the machine which he operated, whether he owned it or

not. The plaintiff rented a machine, other than the one involved in this suit, to the Government on this same project, and the operator of the machine was paid the agreed rent. He turned his payments over to the plaintiff who in turn paid him for his work. As to the shovel here involved the same practice was followed, at least at the beginning, one W. H. Pease, the then operator of the shovel being paid the rental for the first 132 hours. After that, the records are confused and incomplete. In this state of the evidence, and in view of the unlikelihood that the plaintiff would have permitted his machine to remain on the job for long periods if it had not been currently paid for, we presume that the agreed payments were currently made by the Government to the operator of the machine. It was the plaintiff's responsibility to know who that operator was, and to obtain his part of the pay, as he did with regard to his other machine. Having agreed to and acquiesced in this method of payment, he cannot collect from the Government what he may have failed to collect from the operator of the machine.

The petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC., v. THE UNITED STATES

[No. 44978. Decided June 5, 1944]*

On the Proofs

Government contract; provision for adjustment of contract price if minimum wage rates provided for were changed; indirect change in rates by fixing higher rates on another portion of building.—Where in a contract for the foundations of a Works Progress project entered into in November, 1935, the contractor was required to pay certain stipulated minimum wage rates for different classes of labor; and where, before work was begun on

*Defendant's petition for writ of certiorari pending.

the foundations, the Government in February, 1936, entered into a contract for the construction of the building above the foundation, in which higher wage rates were required for the same classes of laborers than in the foundation contract; and where, thereupon, the laborers employed on the foundation contract struck, demanding the higher rates of wages stipulated and paid on the building contract; and where the foundation contractor (plaintiffs) in order to complete the contract was obliged to pay, and did pay, the higher rates of wages; it is *held* that the Government in fact established different wage rates on plaintiffs' job, and plaintiffs are entitled to recover under the provisions of Article 19 of the contract. *Le Veque et al.* v. *United States*, 96 C. Cls. 250, distinguished.

Same.—By stipulating higher wage rates on the same building on which plaintiffs were working the Public Works Administrator did not directly establish minimum rates to be paid by plaintiffs but this was the necessary consequence of what he did.

Same; implied condition of every contract not to hinder other party.—It is an implied condition of every contract that neither party will hinder the other in the discharge of the obligations imposed upon him by the contract nor increase his cost of performance. See *Restatement of the Law of Contracts*, sec. 315 (1); *Williston on Contracts*, sec. 1293A; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551.

Same; decision of contracting officer and head of department on contract price to be paid by defendant does not preclude suit.—Where the contracting officer and head of department decided that the Government had fully performed its obligations under the contract in suit; it is *held* that such decision is not a final decision such as was contemplated under Article 15 of the contract so as to preclude suit in the Court of Claims on the legal rights of the contractor.

Same; agreement void.—Agreements made in advance of the controversy which deprive a party to a contract of recourse to the courts are void. *Insurance Co.* v. *Morse*, 20 Wall. 445, and subsequent similar cases cited.

Same; finality of decisions of contracting officer, architect or engineer on interpretation of contracts and specifications and on questions of fact, and on whether there has been breach of contract.—It is not uncommon in construction contracts to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications, the measurement of the work done, causes and extent of delay, and similar questions of fact, but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determination of that question and for enforcement of rights thereby accruing have never been upheld.

See *Kihlberg* v. *United States*, 97 U. S. 398, and similar cases cited.

Same; the parties by agreement cannot substitute for the Court of Claims a different forum for a suit for breach of contract.—An agreement to leave to the party who drew the contract the determination of whether or not the contract had been breached would be contrary to the Act of Congress (U. S. Code, Title 28, section 250), whereby the United States consents to be sued in the Court of Claims on all claims founded upon "any contract, express or implied, with the Government of the United States."

The Reporter's statement of the case:

Mr. P. J. J. Nicolaides for plaintiffs. *Mr. William F. Kelley* was on the brief.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows, upon a stipulation entered into between the parties, the evidence, and the report of a commissioner:

1. The plaintiffs, Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Company, not incorporated, are citizens of the United States engaged in the building construction business, and maintain their office in the city of Chicago, Illinois.

2. The plaintiffs entered into a contract with the defendant November 26, 1935, signed by Horatio B. Hackett as Assistant Administrator for Federal Emergency Administrator of Public Works, whereby, for the consideration of $104,890, plaintiffs undertook to furnish all labor and materials and perform all work required for Project No. H-1405, in Chicago, Ill., consisting of the construction of the foundations of the Jane Addams Houses.

The work was to be commenced upon receipt by the contractors of notice to proceed and be completed within 75 calendar days after receipt of notice.

3. Article 28 of the contract provided:

> (a) The term "Head of Department" as used herein shall mean the Federal Emergency Administrator of Public Works, and "his representative" means any person authorized to act for him.

(b) The term "Contracting Officer" as used herein shall mean any person or persons duly authorized by the Federal Emergency Administrator of Public Works to have general direction of the work under the contract.

4. Article 3 of the contract provided:

> The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under the Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

Article 15, thus referred to, provided:

> All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

5. Paragraph 1 of Section 12 of Division I of the specifications provided that "Subject to the specification, general conditions and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *."

Carpenters	$1.3125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	0.825

Paragraph 2 of Section 12, *supra*, provided that "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract."

Paragraph 4 of Section 12 also provided as follows:

> The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.

Articles 18 (a) and 19 (a) of the contract, omitting irrelevant portions, provided as follows:

> (Art. 18) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specifications, the hourly, weekly, or monthly wage prescribed for the same in the Specification. * * *
>
> (Art. 19) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administrator of Public Works. In the event that the Federal Emergency Administrator of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.
>
> * * * * *

The specifications were by Article 1 of the contract made a part thereof.

6. The work called for by the contract with plaintiffs was confined to the substructures or foundations of the buildings to be erected by defendant.

7. On November 15, 1935, before the contract had been executed by defendant, plaintiffs received a telephone call from a representative of the defendant in Washington, D. C., by the name of Small, to have a steam shovel on the project the following morning. Plaintiffs complied and placed the steam shovel on the project the next morning, after having let a subcontract for the steam shovel, as plaintiffs had

planned, for the excavation work. This direction was given to plaintiffs for publicity purposes. The shovel brought on the work by plaintiffs excavated only four or five cubic yards of earth on November 16. It does not appear from the record whether or not the direction given to plaintiffs by Small to have a steam shovel on the project on the morning of the 16th was given by direction of the Director of Housing or the Assistant Administrator of Public Works, as the authorized representative of the head of the department. After plaintiffs had excavated a few cubic yards of material with the steam shovel, as above stated, defendant's project manager at the site told plaintiffs to do no other work.

8. On November 21, 1935, the District Manager of the Housing Division of Public Works Administration at Chicago wrote plaintiffs a letter, in reply to their letter of November 19, 1935, with reference to the disposal of excavated material on the project and concluded said letter to plaintiffs with the statement that "With this information at hand, please arrange to proceed with the work under your contract for Foundations for Jane Addams Houses Project H-1405, as outlined in the Plans and Specifications". Plaintiffs proceeded with the work in accordance with this direction of November 21, confining their work at that time to preparatory work such as organizing personnel, surveying, and subletting contracts for materials and services. There were some structures on the site which plaintiffs' contract required them to remove.

9. On December 9, 1935, A. R. Clas, Director of Housing, directed plaintiffs by telegram to proceed with the work.

At noon the next day, December 10, 1935, the contracting officer, due to changes that were being made by him, ordered plaintiffs to suspend all work until further notice. The changes made by the contracting officer consisted of raising the footings of the foundations about two feet and certain other changes which related to the boiler room and coal storage room. The changes in the boiler and coal storage rooms referred to had been decided upon, and revised drawings dated November 20, 1935 with reference thereto had been made and sent to the project manager at the site prior to December 10, 1935, but the work by plaintiffs was suspended and held up by the contracting officer until February 17,

1936, solely for the purpose of consideration by him of the amount by which the contract price should be reduced by reason of the changes shown on said revised drawings of November 20, 1935. This delay of 69 days was unreasonable. There was no provision in the contract which authorized the Government to suspend the work.

On February 12, 1936, the contracting officer advised plaintiffs that—

> * * *, you are instructed to proceed at once with the work under this contract, as modified by the following revised drawings:
>
> FC–1 to FC–14, inclusive, dated November 20, 1935.
>
> An equitable adjustment of your contract price and time will be made, as provided in the contract, and a formal Change Order issued, modifying your contract accordingly.

Plaintiffs received this order to proceed on February 17, 1936, and in their letter to the contracting officer, acknowledging receipt thereof, they advised him as follows:

> We wish to inform you that, due to this delay beyond our control, we have been subjected to expenses of superintendent, watchmen and paymaster wages, insurance, miscellaneous job costs, government office maintenance, estimating and traveling costs, waiting time of excavating equipment, and certain expenses of our Chicago office.
>
> The totals of the above listed expenses we shall forward to you in due time for your approval.

The contracting officer replied to this February 25, 1936, saying:

> As stated in the Proceed Orders issued to you, equitable adjustment of your contract price and time, due to the changes ordered, will be made. Careful consideration will be given to claims presented by you in connection with them.

Due to weather conditions plaintiffs were unable to proceed with the work after receipt February 17, 1936, of the order to proceed, until February 26, 1936, and on February 27, 1936, plaintiffs requested of the contracting officer extension of time "up to February 28, 1936," and repeated their request for additional compensation. Extensions of time were allowed.

Plaintiffs proceeded with the work, as directed, and eventually completed it.

10. Subsequent to the proceed order of February 12, 1936, the contracting officer issued Change Order No. 1 April 17, 1936, under Art. 3 of the contract in which he decreased the contract price in the amount of $9,656.36, based upon the revised drawings of November 20, 1935. Plaintiffs made written protest to the contracting officer in which they renewed their claims for extra costs and expenses as a part of the equitable adjustment to be made under Art. 3 during the period December 10, 1935 to February 17, 1936, when work was suspended because of and in connection with the change under Art. 3. The contracting officer refused to make any adjustments in the change order and on April 22, 1936, advised plaintiffs as follows:

> * * *. Change Order No. 1 is issued without prejudice to your numerous claims which you filed in connection with the authorized revisions. I have previously informed you that although it is my intention to recommend reimbursement for some of these claims, it will be necessary to submit them to the Comptroller General. All of these claims will be presented for his decision at the same time, and as a result it is necessary that you submit itemized substantiation covering those which have been presented in general form only.

Plaintiffs appealed to the head of the department under Art. 15 of the contract.

Subsequently the contracting officer made some other changes for which he issued change orders, from which plaintiffs also timely appealed to the head of the department. However there was no suspension of the work or delay in connection with any of the change orders other than Change Order No. 1 of April 17, 1936.

11. The items of the claim made in the petition herein by plaintiffs are as follows:

(1) Maintenance of staff and equipment December 12, 1935, to February 17, 1936; *increase of wage rates due to delay for that period;* increased cost of removal of earth due to frost penetration	$20,000.00
(2) Failure to include overhead and profit in Change Order No. 1	186.32
(3) Allowance of less than fair and reasonable compensation for removing hidden obstructions	155.28
(4) *Increased wages*	6,396.00
	26,737.60

The parties herein stipulate and agree by written stipulation signed by counsel for plaintiffs and by the Assistant Attorney General that plaintiffs are entitled to recover the sum of $8,727.44, and only that amount, in connection with all their claims against the defendant presented by this suit, other than their claim based on the wage increases which took place during the course of performance of the contract in question. Defendant consents to entry of a judgment in the amount of $8,727.44 and plaintiffs accept said amount as full compensation for all the said claims, other than that based on the wage increases, item 4 above, amounting to $6,396.

12. On December 28, 1935, plaintiffs received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administration of Public Works was about to change the scale of wages for carpenters and laborers on P. W. A. projects. At that time the Government had not issued invitation for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by plaintiffs' contract. The Government specifications and invitation for bids for such superstructures were issued February 15, 1936, and set forth the scale of wages, applicable to the superstructures, of certain wage earners, among others, as follows:

	Rate per hour
Carpenters	$1.50
Cement finishers	1.50
Hoisting engineers	1.50
Common laborers	.95

At the commencement of their work plaintiffs began paying the rate of wages set forth in this contract for the foundations (see finding 5) and continued to pay such wages until sometime in February or March of 1936. Defendant did not at any time expressly request plaintiffs to pay higher wages. Plaintiffs' force was unionized and, because plaintiffs were not paying the wage scale provided in the invitation and specifications for the superstructures, which were not a part of plaintiffs' contract, the Union called a strike and thereby enforced the payment by plaintiffs of the wage scale provided for the project for the superstructures. The Union demanded payment of back wages on the increased scale, retro-

active to January 8, 1936, and plaintiffs acceded to the demand.

13. The scale of wages announced in the invitation for bids and specifications for the superstructures was higher than the scale prevailing in the territory at that time on private jobs. The Government did not participate in negotiations between plaintiffs and the striking workmen.

The difference paid by the plaintiffs between the two scales, that on the foundations and that on the superstructures, amounts to $4,321. With added workmen's compensation and social security, the sum of $4,321 is increased to $4,660.83.

14. A dispute arose between the parties to the contract in suit as to reimbursement by defendant to plaintiffs for the additional wages they paid over and above those set forth in the invitation for bids and the contract, the plaintiffs contending that defendant had established higher wages on the project and that they were also entitled to be reimbursed such increase as an added cost due to changes made by defendant in the foundations and consequent suspension and postponement of the work to the time when defendant's higher scale of wages for the superstructures was announced.

The final Change Order No. 1 (first issued by the Director of Housing April 17, 1936), covering the foundations was revised and reissued by the Assistant Administrator on June 25, 1936, after plaintiffs' work had been substantially completed, and such change order did not include the wage increases in dispute, but reserved to plaintiffs their right to prosecute their claim, then pending, to such increase. This change order of June 25, 1936, decreased the contract price, as a result of the changes shown on the revised drawings dated November 20, 1935, by $4,721.94, instead of $9,656.36, as first decided by the contracting officer.

15. At the time the contracting officer issued the formal change order of April 17, 1936, as above-mentioned, he advised plaintiffs that he would not allow therein, as a part of the equitable adjustment under Art. 3 of the contract, the actual costs and expenses incurred by plaintiffs in connection with the changes made in the revised drawings, or the increased wages, due to the stoppage and suspension of the work, but that a determination with respect to such items

of extra costs and expenses would be made and a recommendation with respect thereto transmitted to the General Accounting Office for action. Plaintiffs asserted that all their claims for extra costs and expenses were directly attributable to the stoppage and suspension of work in connection with and due to the change and made claim therefor as a part of the equitable adjustment to which they insisted they were entitled under the provisions of Art. 3 of the contract.

On June 29, 1936, the Assistant Administrator of Public Works made written decisions and findings of fact with reference to the various items of the claim asserted by plaintiffs on appeal. His findings and decision with reference to Item 3 of plaintiffs' claim, as a part of the equitable adjustment to which they insisted they were entitled, in the amount of $8,743.42 for extra costs resulting from the stop order and delay due to the change in connection with the revised drawings, were typical of all other findings made by him in connection with such items. In this connection he advised plaintiffs as follows:

> I have reviewed the various claims presented by you involving appeals from decisions made by the Director of Housing as contracting Officer with reference to your contract, * * *. I am listing below the items of your claims, together with my finding with reference thereto: * * *
>
> *Item No. 3*
>
> *Contractor's Claim for Damages in the Amount of $8,743.42 Resulting from Delay Caused by Revised Drawings and Stop Order*
>
> This claim includes such items as superintendent's time, watchmen's time, paymasters' time, power shovel waiting time, including watchmen, miscellaneous job expenses and pro-rated Chicago office expenses. I find that this claim is occasioned by the stopping of work by the Government on December 12, 1935, from which time until February 17, 1936, the job was shut down. I further find that the inability of the contractor to perform any work during this period was occasioned by the direct orders of the Government and was without fault or negligence on the part of the contractor. I further find that as a result of this delay the contractor was occa-

sioned expenses, over and above those figured in computing the credits allowed under Change Order No. 1 above referred to and which, but for the stopping of the work by the Government, would not have been occasioned, in the amount of $4,085.58. Attached and marked Exhibit "B" is a detailed statement of such expenses. The matter of the payment of any amount because of additional expenditures involved must be submitted to the General Accounting Office for its ruling as to whether or not any of the items submitted in your claim for $8,743.42 are properly payable by the Government. Your claim, together with my findings as above noted, will be transmitted to the General Accounting Office at the time the final voucher is submitted for payment and that office will make final settlement.

16. In the same decision and findings of June 29, 1936, the Assistant Administrator made findings of fact and decisions with reference to the claim of plaintiffs for wage increases above the minimum wage rates set forth in the specifications of their contract, which findings and decision were transmitted to plaintiffs, as follows:

Item No. 6—Wage Increase in the Amount of $6,936 over and above Minimum Wage Rate Specified

I find that the increase in wage rates was occasioned by no fault of the Government, that the Contract placed upon the contractor the obligation of securing workers for the project, and that except as directly authorized by the Government no allowance would be made for increased wage rates. Accordingly, the claim in the amount of $6,936 must, therefore, be disallowed.

Item No. 7—Wage Increase in the Amount of $3,467 over and above Minimum Wage Rates Specified, Resulting from Delay Due to Revision of Drawings and Stop Order

This claim arises because of the fact that from the 12th day of December, 1935, at which time work was stopped, up to January 8, 1936, the wage rates in effect were lower than those prevailing after January 8, 1936. I find that, had the contractor been permitted to work during the period from December 12 to January 8, he could have obtained workers at the lower rate prevailing up to such date; and because of the delay the work which would otherwise have been performed during the time of the lower pay rate had to be performed

after the new wage rate went into effect. I find that because of this delay the contractor was put to an additional expense of $909, which includes 10 percent for overhead and 10 percent for profit. The payment of this item is dependent upon the opinion of the General Accounting Office and will be submitted to it in the same manner as the claims listed under Item No. 3. [i. e., for settlement].

17. Following the above-mentioned findings and conclusions, the contracting officer proceeded with the matters of final acceptance of the work which had theretofore been completed by plaintiffs, the preparation of the final voucher under the contract, and the securing of releases from plaintiffs and their surety for the purpose of making final settlement. During this time, and before the final voucher was prepared, plaintiffs on February 12, 1937, in a letter of that date addressed to the Federal Emergency Administrator of Public Works, the head of the department, petitioned him to make a decision on the various items of the claim which had been considered by the Director of Housing and by the Assistant Administrator, as his authorized representative, and to allow such items of the claim as a part of the equitable adjustment under the contract and to include them in the voucher for final payment under the contract.

Plaintiffs on March 29, 1937, executed a voucher as the final voucher under the contract for $24,048.25 as the claimed "balance due on contract and changes." To this voucher was attached a release signed by plaintiffs and their surety specifically reserving their rights with respect to seven items in stated amounts totaling $23,548.31, one of which, in the amount of $1,725.20, had been allowed for payment by the Assistant Administrator.

18. On May 20, 1937, Harold L. Ickes, Federal Emergency Administrator of Public Works, after considering plaintiffs' appeal to him, as above-mentioned, made findings of fact, conclusions, and recommendations on the various items of plaintiffs' claim in a letter addressed to the Comptroller General, and accompanied by the final voucher above mentioned. With respect to the claim made by plaintiffs for reimbursement under the contract for increased wages, Mr. Ickes stated in this letter to the Comptroller General as follows:

Reference is made to the Contractor's claim in the total amount of $10,403 for wage increases over and above the minimum wage rates specified. This claim may be divided into two parts; one for $6,936, resulting, according to the Contractor, from fundamental changes in economic conditions, and the other for $3,467, resulting, according to the Contractor, from the issuance of the specification for superstructure work on this project, which specification established wage rates different from those set up in the foundation specification and different from those applicable at the time of issuance of the aforementioned stop order. I find, after checking the certified pay rolls in connection with the entire project from its inception on December 12, 1935, up to and including its completion of final pay roll on May 19, 1936, that the B-W Construction Company did actually pay a total of $4,259.12 in excess of the minimum rates specified to the laborers and mechanics employed directly at the project site. I find also that the N. Cullen Company, a Subcontractor, actually paid $61.88 in excess of the minimum rates specified. By totaling the increase in wages over and above the minimum rates specified, as indicated above, it is noted that the Contractor and the Subcontractor did pay $4,321 more than the minimum wages required by the contract. The Contractor in arriving at his total of $10,403 used a percentage basis rather than the actual excess wages paid over those specified. I find that there were no fundamental changes in economic conditions as contemplated by Article 19 (a), as amended, of the contract, and I recommend that the claim for $6,936 be disallowed. As to the Contractor's claim for $3,467, you are informed that the labor rates specified in the contract are minimum rates only. I understand that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement, which I understand established the rate contractors were to pay as wages up to and including January 1, 1936. I understand that the Contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. Consequently, the Con-

tractor should have been guided by the Unions' agreement, and it is my opinion that it was his obligation to provide, in his bid, against any possible increase in wages over and above the minimum specified, due to the fact that the Government did not specify the maximum rate. Moreover, Division I, page 6, paragraph 4, Section 13 [12] of the Specification, states:

> The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.

I am of the opinion that this claim should be disallowed in its entirety, as I find that the acts of the Government, in advertising for the superstructure contract and in establishing rates for that contract on February 15, 1936, did not increase the wage rates that the Contractor was obligated to pay, and that wages were increased because of the expiration on January 1, 1936, of the agreement with the Unions, and the signing of a new agreement. Furthermore, I am of the opinion that the Contractors in the City of Chicago were advised by the Unions that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936.

I find that the issuance on December 12, 1935, of the aforementioned stop order, prevented the Contractor from proceeding with the work until a proceed order was issued on February 17, 1936. The expenses incurred by the Contractor, due to this act of the Government prohibiting him from starting with his work on December 12, which would have allowed him to pay the prevailing rates for wages as of that date, namely, 82½¢ per hour for laborers and $1.31¼ for carpenters, up to and including January 8, 1936, which is the date upon which the Contractor started to pay a higher rate, namely 95¢ per hour for laborers and $1.50 per hour for carpenters, is a fair and just charge against the Government. Therefore, I recommend that the Contractor be reimbursed for the increase of wages he paid to laborers at the rate of 12½¢ per hour and the increase of wages he paid carpenters at the rate of 18¾¢ per hour for the total hours of laborers employed and the total hours of carpenters employed in the 26 days following the date of Proceed Order, namely, February 17, 1936. The manner in which I arrive at this 26 days

is by using the Stop Order date of December 12, up to and including January 8, which is the date the higher wages went into effect, as the amount of days, the Contractor would have been able to employ men at the lower wages. The total number of labor hours in the first 26 days after February 17 (which in reality was February 24 due to the fact the Contractor could not proceed on account of weather conditions) indicated on the Contractor's and his Subcontractor's certified pay rolls as having been paid on the increased wage basis, namely, 95¢ per hour, is 983½ hours, and when extended at the rate of 12½¢ per hour equals $122.94. The total number of carpenters' hours in the first 26 days after February 17, 1936 (which in reality begins on March 16, 1936, due to the fact that the carpenters were on strike), as indicated in the certified pay rolls, is 3,351 hours, and when extended at the rate of 18¾¢ per hour is $628.31, making a total increase for laborers and carpenters of $751.25 and I recommend that the Contractor be paid 10 percent overhead and 10 percent profit, which is in accordance with the specifications when an extra is involved, which makes a total of $909.00, and my finding is that this amount is chargeable to the cost of arriving at the settlement between the original contract plans and the revised plans and is an item of damages against the Government. * * *

There is enclosed a voucher in the amount of $24,048.25, which amount includes all of the Contractor's claims enumerated and commented on herein. Also enclosed are the Certificate of Completion and the Certificate and Release relating to this contract.

The Contractor has refused to execute separate vouchers, one for the final payment under the contract as adjusted, in the amount of $2,225.06 and one for the amount of his claims, namely, $21,823.19. Therefore, of the total amount of the voucher enclosed I hereby certify that $2,225.06 is due the Contractor as final payment under the contract as adjusted.

The balance of the enclosed voucher in the amount of $21,823.19 is referred to you for direct settlement without my certification, but it is my recommendation that, in addition to the amount I have certified as being due under the contract, the Contractor be reimbursed for the individual items recommended in settlement of this claim.

19. The statement made in the above-quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions

of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936.

20. The Comptroller General upon receipt of the final voucher executed by plaintiffs and the letter and recommendations of Administrator Harold L. Ickes refused to authorize payment under the contract of any of the controverted items of plaintiffs' claim, but approved the voucher for the amount of $2,225.06 as the amount otherwise due under the contract, as certified by the head of the department, and issued a certificate of settlement accordingly on February 7, 1938.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue to recover extra costs incurred due to a suspension of the work for 69 days during which a change in the plans and specifications was being considered. It is stipulated that they are entitled to recover $8,727.44 on this account.

They also sue to recover for increased wages which they were required to pay common laborers, carpenters, cement finishers, and hoisting engineers.

Plaintiffs had a contract for the construction of the foundations of the Jane Addams Houses in Chicago. It was a relief project; it was intended to relieve unemployment, to provide a living wage for laborers and so to increase their purchasing power. What a living wage was, was fixed by the contract. The contractor was required to pay a minimum wage for common laborers of 82½ cents an hour, and for carpenters, cement finishers, and hoisting engineers of $1.31¼ an hour. It was recognized, however, that the cost of living might increase during the progress of the work or for some other reason that the Government might find it desirable that even higher wages should be paid, and so it was provided in article 19 of the specifications that if the Federal Emergency Administrator of Public Works "establishes different wage rates, the contract price shall be adjusted accordingly. * * *"

The contract was entered into on November 26, 1935, but defendant held up the work until February 17, 1936, when it gave plaintiffs notice to start work; however, work was not begun until February 28, 1936, due to bad weather. While the work was under suspension the defendant on February 15, 1936, asked for bids on the construction of the building above the foundation. (Plaintiffs' contract was for the foundation only.) This advertisement for bids required bidders to pay a minimum wage to the before-mentioned laborers higher than was provided for in plaintiffs' contract. A successful bidder on this part of the building could not pay common laborers less than 95 cents an hour, instead of the 82½ cents on the foundation contract, and could not pay carpenters, cement finishers, and hoisting engineers less than $1.50 per hour, instead of the minimum of $1.31¼ on the foundation contract.

Whereas on November 26, 1935, the Government thought not less than $1.31¼ was a fair wage for carpenters, cement finishers, and hoisting engineers, and 82½ cents for common laborers, by February 15, 1936, conditions had changed to such an extent that it no longer considered these fair wages and demanded of the superstructure contractor the payment of higher wages.

Plaintiffs' work did not commence until after this change in the wage rate. So, when they offered to pay their carpenters, cement finishers, and hoisting engineers $1.31¼ and common laborers 82½ cents, these men very naturally said, no, the Government has said that no less than $1.50 and 95 cents is fair; and when plaintiffs would pay no more, they struck. In order to induce them to work plaintiffs had to pay the $1.50 and 95 cents.

All the proof goes to show the laborers would not have struck except for the Government's action in establishing a higher minimum wage on the very same building on which plaintiffs' laborers were employed.

That they should have struck was well-nigh inevitable. They had no contract with plaintiffs to work at any fixed wage and, so, when their Government said that the least that ought to be paid for such labor was more than plaintiffs offered, of course they demanded the amount fixed by the Government as fair and refused to work for less.

So, while the defendant did not expressly demand of these plaintiffs that they pay a higher minimum wage on their contract, it nevertheless brought about conditions that made this almost inevitable, and it must have known that this would be the necessary consequence of its act. Just as effectively as though it had directly ordered plaintiffs to pay a higher wage, it indirectly required them to do so.

In *LeVeque, et al.* v. *United States*, 96 C. Cls. 250, we held that the establishment by the Government of higher wages on another project in another part of the city did not require it to pay plaintiffs the increased wages they had to pay on their project. In that case we concluded the increase in wages paid by plaintiffs was not a necessary result of defendant's act. Here we think it was. The increased wages in this case were on the very same building on which plaintiffs were working. The Administrator did not directly establish different minimum rates to be paid by plaintiffs, but this was the necessary consequence of what he did. He did indirectly that which if done directly would have rendered the Government liable. We are of opinion that the defendant in fact established different wage rates on plaintiffs' job, and, therefore, it is obligated to pay the increase under article 19.

But whether or not this is so, it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. *Restatement of the Law of Contracts*, sec. 315 (1); *Williston on Contracts*, sec. 1293 A; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551. It was an implied condition of this contract that the Government would not do any act that as a necessary consequence would make performance by the plaintiffs more expensive. The Government breached that implied condition by increasing the minimum wage to be paid on a part of this building, which as a necessary consequence required plaintiffs to pay more wages than those specified.

It follows that the defendant is liable for the increased wages plaintiffs had to pay.

It is said, however, that the contracting officer and head of the department have decided that the Government has fully

performed its obligations under the contract, and that this decision is final under article 15 of the contract and that, therefore, this court has no jurisdiction to determine the matter.

The defendant's position, otherwise stated, is that the parties agreed in advance of the dispute to waive their right to sue for this breach of the contract and to leave the final determination of the controversy to the decision of one of the contracting parties.

We do not think the parties intended article 15 to have such broad scope. If they did, it is clearly illegal under numerous decisions of the Supreme Court of the United States and of other Federal courts and of the State courts. It has long been settled that any agreement made in advance of the controversy which deprives a party of recourse to the courts is contrary to public policy and, therefore, void. *Insurance Co.* v. *Morse*, 20 Wall. 445, 450, et seq.; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 537; *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, 142; *Martin* v. *B. & O. R. R.*, 151 U. S. 673, 684; *Terral* v. *Burke Construction Co.* 257 U. S. 529. See also cases cited in 13 *Corpus Juris*, p. 455, notes 3, 5 and 8; 17 *Corpus Juris Secundum* p. 603, notes 58–66.

In *Insurance Co.* v. *Morse*, *supra*, there was involved a statute of Wisconsin which imposed on foreign insurance companies, as a condition to doing business in the State, an agreement to submit to the exclusive jurisdiction of the Wisconsin courts and to forego removal of a case to the Federal courts. It was held that the statute was unconstitutional and void, because "a man may not barter away his life or his freedom, or his substantial rights."

The statement of this principle was somewhat amplified in *Doyle* v. *Continental Ins. Co.*, *supra*, in commenting on the *Morse* decision. It was there said, on page 538:

> It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the State courts to the Federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which

all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights.

The majority of the court, however, held that, while a State could not impose this condition on an insurance company's entering into business, it nevertheless had the right to revoke its license, even though a breach of the condition may have been the reaşon for the revocation. Justices Bradley, Swayne, and Miller dissented on the ground that the same reason that prevented the imposition of such a condition prevented the revocation of the license for its breach. Both the majority and minority agreed, however, that a condition in a contract prohibiting resort to a tribunal otherwise having jurisdiction of the subject matter and the parties was illegal.

Fifty years later, this view was approved by the Supreme Court in the case of *Terral* v. *Burke Construction Co.*, 257 U. S. 529, and we understand it to be the law today. Section 558 of Restatement of the Law of Contracts reads:

> A bargain to forego a privilege, that otherwise would exist, to litigate in a Federal Court rather than in a State Court, or in a State Court rather than in a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted, is illegal.

It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications, whether or not the work or materials comply with the specifications, the measurement of the work done, causes and extent of delay, and similar matters of fact (e. g., see *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 695; *Plumley* v. *United States*, 226 U. S. 545; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323); but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determina-

tion of that question and for enforcement of rights thereby accruing have never been upheld. For instance, in *Guaranty Trust Co.* v. *Green Cove R. R.*, *supra*, a provision of a trust deed agreeing not to resort to the courts for its enforcement was held invalid on the authority of a number of English and State cases there cited.

Even arbitration agreements, not authorized by statute, leaving to arbitrators the final determination of whether or not there has been a breach of the contract, are illegal, but parties may legally agree on arbitration to determine facts upon which a duty depends. See *Restatement of the Law of Contracts*, secs. 550 and 551; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120–121.

Here the agreement, as construed by the defendant, is to leave the settlement of the dispute, not to arbitrators, but to an agent of one of the parties. It is an agreement to leave to the party who made the contract the determination of whether or not it had breached it.

If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court save only in those cases where the decision of the contracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued. On February 24, 1855, Congress passed an Act creating the Court of Claims and said, "*the said court* shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States. * * *" (Italics supplied.) This provision is the law today. Section 145 of the Judicial Code; sec. 250, Title 28, U. S. C. It was the law when this contract was entered into. Can it be said that it was in the power of any officer or agent of the Government to set aside this Act of Congress and to say that the contracting officer, and not the Court of Claims, "shall hear and determine all claims founded upon [this] contract"? Such a provision is contrary to the law established by Congress and, therefore, is void.

Not only is it beyond the power of a party to bargain away this right given by Congress, but it must be borne in mind

that bidders on this work were forced to enter into this sort of an agreement. The Government contends that as to this project this governmental agency said, the right given by Congress to sue in the Court of Claims is hereby taken away; an aggrieved contractor can secure redress only by appealing to the contracting officer; he will decide whether or not we have paid you all we promised to pay.

This would be a shocking demand; *Barlow, et al.* v. *United States*, 35 C. Cls. 514, 546; we do not believe the government intended to make it. We are of opinion that they intended to demand only that the contracting officer should decide questions of fact arising as the work progressed, such as the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work, etc. Article 15, providing for decisions by the contracting officer, concludes, "In the meantime the contractor shall diligently proceed with the work as directed." This clearly indicates they had in mind only those disputes that arose during the progress of the work. It negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to.

We are of opinion the defendant is liable for increased wages paid by the plaintiffs in the amount of $4,660.83. On the whole case plaintiffs are entitled to recover the sum of $13,388.27. Judgment for this amount will be entered. It is so ordered.

Whaley, *Chief Justice*, concurs.

MADDEN, *Judge*, concurring:

In my opinion, the case should be decided upon the ground that, whether or not the express provision of Article 19 was applicable, the Government, like any other contractor, impliedly agrees that it will not by its acts increase the cost of performance of the contract by the other party. We need not consider the effect of acts of the Government in its sovereign capacity, such as increasing taxes, or setting wages or hours by laws of general application. Here the act complained of was the setting of wages on one specific job, which was the

superstructure to be built on the foundation which the plaintiff had contracted to build.

The Government breached this term which we read into the contract because it is fair and the parties to the contract must have intended it. Yet the Government urges that Article 15 of the contract gave the Contracting Officer the power to read this term out of the contract, by deciding that the plaintiff was not entitled to a remedy for its breach. I think there are two objections to this argument.

(1) There is no indication that the Contracting Officer ever made a decision or gave any consideration to such a term of the contract, or was aware that it contained any such term. This fact points to one of the difficulties that would be created by lodging in a contracting officer, nearly always a layman, the power to decide a question which cannot be decided without an understanding of the way in which the law has traditionally interpreted the texts of writings which appear in litigation. The consequence would be an interpretation which would stick in the letter of the contract, and fail to reach its real meaning and equity. I think, therefore, that the Contracting Officer never decided the question which we are called upon to decide.

(2) I think that the parties never intended that the Contracting Officer should have the power to decide the question which we have before us, i. e., the question of whether or not the Government breached its contract. In spite of the broad language of Article 15 of the contract, it must be that there are limits to its scope. In fact, the evidence in cases before us shows frequent examples of situations in which the Contracting Officer has disclaimed any power to decide that the contractor is entitled to compensation for unreasonable delay caused by acts of the Government. He knows that his decision would be substantially meaningless, since he could not award compensation, except by the expedient of covering it into some change or adjustment which he is authorized to make as the contracting agent for the Government. So he advises the contractor to seek relief from the Comptroller General first and, if he does not get it there, from this court. The Comptroller General, whose powers are somewhat undefined and whose expenditures are, so far as the Government

is concerned, practically unreviewable, sometimes gives relief. If he does not, the contractor may come to this court, and the Government may not urge that his case is concluded by a decision made somewhere else, since the Contracting Officer made no decision at all, and the Comptroller General's decision does not, either by the contract or by law, foreclose resort to this court.

Since the Contracting Officer cannot make a decision, effective against the Government, that the Government has breached its contract, and since, if he did so, we would not be bound by it, he frequently does not decide the question at all if his decision would be against the Government. This means that, in practice, the contractor, if he meant, by agreeing to Article 15, to lodge in the Contracting Officer the power to decide questions of breach of contract, has given that official power to decide cases against him, but no power to decide cases, effectively, in his favor. No contractor in his right mind would ever intend to do that. And no Government official, in drawing a contract, would intend to include in it such an unconscionable provision. And if both of them did, with their eyes open, intend any such agreement, we would feel bound to conclude that the law permitting Government agents to make contracts, and the statutes giving to a victim of the Government's breach of contract the right to sue in this court, do not authorize an agent of the Government to defeat that right by making such an unconscionable bargain about it. I therefore agree with the court that Article 15 was not intended to give to the Contracting Officer the power of decision which the Government claims for him, and that we are not foreclosed from deciding the case.

I recognize that, under Article 15 and other provisions of the standard Government contract, many matters of vital consequence to the contractor may be decided by the Contracting Officer without effective review by this court. The consequences are sometimes, in our opinion, harsh and unjust to the contractor. And the line between what the Supreme Court and this court have sanctioned in those cases, and what we refuse to sanction here may not always be easy to draw. But what the Government here urges, the power in the Contracting Officer to decide the ultimate question of whether his principal has breached its contract, should not be tolerated.

LITTLETON, *Judge*, dissenting in part: I dissent as to the allowance of any part of the sum of $4,660.83 (finding 13) on account of increased wages.

In support of their claim for the recovery of these increased wages plaintiffs insist that section 12, Division 1, of the specifications and article 18 (a) of their contract (finding 5) fixed the wages that they were to pay under the contract and that, by article 19 (a), the Government agreed to reimburse them by adjustment of the contract price in the event the Administrator of Public Works established different wage rates. They further insist that the Administrator did establish higher wage rates within the meaning of the provisions of the contract and specifications mentioned. I cannot agree. The wages specified in plaintiffs' contract were minimum rates only. Article 19 (a) of the contract and paragraph 4 of section 12 of the specifications contemplated, I think, that the Government would increase plaintiffs' contract price only in the event the Administrator established greater minimum wage rates under their contract and directed them to pay wages at such increased rates. The "project," referred to in art. 19 (a), was the foundation work and not the buildings which the Government might, under another contract, erect thereon. Each P. W. A. contract made was given a project number, and plaintiffs' contract was "Project No. H-1405." The Administrator did not establish greater minimum wage rates under plaintiffs' contract nor on the "project" covered thereby, nor did he direct or otherwise directly force them to pay any increased wages. He did nothing except what he had a perfect legal right to do so far as plaintiffs' contract was concerned. Perhaps he should not have advertised for another contract at higher minimum wages, which would result in a higher bid price to the Government, until plaintiffs had finished their contract which was closely related to the new work, but this was not a breach of any express or necessarily implied provision of their contract and cannot be made the basis of a claim for reimbursement under art. 19 (a). *Dravo Corporation* v. *United States*, 93 C. Cls. 734. Moreover, section 12 of the specifications provided that the Government would not consider any claims for additional compensation because of pay-

ment by the contractor of any wage rate in excess of the applicable rate contained therein, and that all disputes with labor in regard to payment of wages in excess of those specified "shall be adjusted by the contractor." This provision appears to have contemplated an event such as actually happened, i. e., a strike for higher wages.

The minimum wage rates set forth in plaintiffs' contract were fixed by the Administrator of Public Works in the invitation for bids and specifications for the particular project covered by that contract under the Rules and Regulations approved by the President December 26, 1934, issued under authority of section 209, Title II of the National Industrial Recovery Act, and Executive Order No. 6929, which Regulations, so far as material here, were as follows:

> WHEREAS, the President, by Executive Order No. 6929, of December 26, 1934, has delegated to the Federal Emergency Administrator of Public Works the power * * * to prescribe new rules and regulations * * * I hereby prescribe the following rules and regulations under the authority of the said section 209 as necessary to carry out the purposes of said Act, which rules and regulations shall apply to all projects constructed in whole or in part under Title II of said Act: * * *
>
> 3. *Wages.* The wages paid to employees directly employed on any such project shall not be less than the applicable minimum wage rates which the Administrator may fix from time to time. Should it appear that any individual employed on any such project has been or is being paid less than the minimum wage fixed by the Administrator and in force at the time such labor was performed, the employer of such individual shall be notified to pay him all wages due according to the prescribed rate. Upon ten days' default on the part of any such employer after the receipt of such notice he shall be subject to the penalties provided in said Act for violation of these regulations.

The actual increased wages of $4,321, which plaintiffs incurred, were incurred and paid as a direct result of a demand and strike of their Union employees. Except for this, plaintiffs would not have been required by the Administrator, or otherwise, to pay any increased wages. Defendant did not request plaintiffs to increase the wage rates and no one representing the Government or the Administrator participated

in the dispute between plaintiffs and the labor unions. The fact that the labor unions of the Chicago territory may have failed to abide by their wage agreement with the Building Trade Employers' Association, of which plaintiffs were members, cannot be made the basis of a claim for reimbursement against the Government. Nor can the Government be held liable to plaintiffs for reimbursement of the increased wages which they were compelled to pay under the circumstances, because the Government on February 15, 1936, issued invitations for bids and specifications for another contract on another and a different project for the buildings to be constructed on the foundations covered by plaintiff's contract in which minimum wage rates higher than those contained in plaintiffs' contract were specified. The provisions of plaintiffs' contract did not expressly cover such a situation, and the language used in art. 19 (a) and paragraph 12 of the specifications cannot be so extended as to include it by implication. *Leslie L. LeVeque et al.* v. *United States*, 96 C. Cls. 250. *Hood & Gross* v. *United States*, 90 C. Cls. 258, 265; *James I. Barnes* v. *United States*, 92 C. Cls. 32, 43, 44. Cf. *Blair* v. *United States*, 321 U. S. 730, April 10, 1944.

Art. 15 of the contract made the decisions of the contracting officer and the head of the department final on such questions. They both considered and rendered adverse decisions on the question whether the Administrator had established different wage rates in such a way as to require reimbursement to plaintiffs for the increased wages which they paid. This was clearly a "dispute concerning questions arising under this contract" and their decisions were final under the express agreement of the parties. These decisions were clearly not arbitrary, and they were clearly not so grossly erroneous as to imply bad faith. We cannot, therefore, ignore them. *Ripley* v. *United States*, 220 U. S. 491; 222 U. S. 144, 147; 223 U. S. 695, 696, 701, 702. *Burchell* v. *Marsh*, 14 How. 344, 349, 350.

Defendant makes the contention that plaintiffs did not appeal from the decision of the contracting officer to the head of the department. This contention appears to be based on the assumption that the Assistant Administrator was the contracting officer. Plaintiffs did appeal, and within time.

Under the contract provisions the Director of Housing, A. R. Clas, was the contracting officer, as the Assistant Administrator stated in his decision of June 29, 1926. The Assistant Administrator of Public Works, Horatio B. Hackett, although he signed the contract, was the head of the department within the meaning of the contract as defined by article 28 (a). He was duly authorized to act for the Administrator and he did so act with reference to approval of change orders and consideration and decisions of appeals.

Plaintiffs make the alternative claim that even if their claim for reimbursement of the increased wages, as such, should be denied they should have judgment for at least $909 on account of such wages (they claim the amount should be $1,856.08) under the findings and recommendations of the Assistant Administrator in his letters of June 29 and August 12, 1936, to plaintiffs and in the letter of the Administrator of May 20, 1937, to the Comptroller General (finding 18). These officials decided in connection with plaintiffs' claims for extra costs that the expenses necessarily incurred by plaintiffs, including a portion of the increased wages, as a result of the stoppage and suspension of their work from December 10, 1936, to February 17, 1937, in connection with changes could not be allowed by them as an increase in the contract price as a part of an equitable adjustment under art. 3 of the contract in connection with the change order. This position appears to have been taken because of certain rulings of the Comptroller General. (See 7 Comp. Gen. 645; 12 Comp. Gen. 179, 227). They therefore made findings with reference to the amounts and the cause of these expenses, and recommended to the Comptroller General that certain amounts be paid. While these findings and recommendations should be given great weight if the items covered thereby are found by the Court to be allowable, either under the contract or as damages for a breach thereof, they are not such decisions as are made final and conclusive by art. 15 for such purposes. The evidence of record does not warrant a finding by the Court that of the total increased wages paid by plaintiffs the amount of $1,556.06, or $909 thereof, was incurred as a result of delay due to suspension of the work for 69 days

in connection with the change under the contract as mentioned in the findings.

I think judgment should be entered in favor of plaintiffs for only $8,727.44.

JONES, *Judge*, took no part in the decision of this case.

CHARLES FRANK MELCHER AND RUDOLPH BRINSKELLE v. THE UNITED STATES

[No. 45707. Decided June 5, 1944]

On the Proofs

Suit under special act; tort.—It is held that negligence on the part of defendant's employees was responsible for destruction by fire of cabin belonging to plaintiffs, and plaintiffs are accordingly entitled to recover under the provisions of the special act (55 Stat. 944).

The Reporter's statement of the case:

Mr. Camden R. McAtee for the plaintiffs.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. This action was duly instituted as authorized by an Act of Congress designated as Private Law No. 136, 77th Congress, 1st Session, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment on the claim of R. Brinskelle and Charlie Melcher for damages for loss of a fishing cabin located on Warrior River, Jefferson County, Alabama, on or about March 6, 1937, because of fire allegedly caused by negligence of Government employees in connection with clearing operations along the banks of the Warrior River and its tributaries.
>
> SEC. 2. Suit upon such claim may be instituted at any time within one year after enactment of this Act and proceedings for the determination of such claim, appeals therefrom, and payment of any judgment thereon

shall be in the same manner as in the cases over which such court has jurisdiction under section 145 of the Judicial Code, as amended.

Approved, July 24, 1941.

2. Plaintiffs are citizens of the United States of America and residents of the City of Birmingham, State of Alabama.

3. In 1928, the plaintiffs acquired a lot 100 x 100 feet in the northwest corner of a 40-acre tract in the northeast quarter of the northwest quarter of Section 2, Township 18, Range 7 west, in the State of Alabama, and during that year constructed thereon a three-room cabin with a large front porch. A few years later they added a rear porch. They used the cabin primarily for entertaining their friends and business associates. It was constructed of wood with some stone pillars and was weatherboarded with dressed lumber. It was painted on the outside, had a composition roof, and was fully screened. The furnishings consisted of a dining suite; heater; locker; five beds with good mattresses; several folding beds for use on the porches; two phonographs; a slate dining table; a marble table for rear porch; a round table for the rear porch; chairs; stove; cooking utensils, and other articles necessary to the enjoyment of the cabin for the purposes mentioned.

4. The cabin was situated at or near the top of a wooded hill which extended upward and northwestward from Chichester Slough on Hurricane Creek near the point where Hurricane Creek empties into Warrior River, the cabin being about 450 feet from the edge of the slough. Northwestward from the cabin and down the hill on the other side from the slough there was an illicit whiskey still in a hollow near the east bank of Warrior River and also near the point where Hurricane Creek empties into Warrior River. This still was about 500 feet from the cabin. The area at and near the still had been cleared and burned about a week before the fire of March 6, 1937, and there had been a rain in the meantime.

5. On March 6, 1937, and for some days prior thereto, the defendant was clearing the banks of, and the land adjacent to, Hurricane Creek and Warrior River in the vicinity of the cabin and was burning the logs from the trees which

had been cut down and also the brush, dead foliage and other inflammable materials. This work was being done in anticipation of the raising of Lock 17 on Warrior River and the inundation of the land being cleared. The foreman on the job was one Henry C. Edwards.

6. The safety measures generally taken to prevent the spread of the fires consisted of raking the leaves, twigs, and other inflammable materials from the edge of the area being cleared, down toward the water's edge, and the leaving of a watchman on duty at night when believed to be necessary.

7. On Friday, March 5, 1937, several fires built by the Government's crew were burning along the banks of, and in the area adjacent to, Chichester Slough some 500 feet or more from plaintiff's cabin and, as was customary on week nights, a night watchman was left on duty that night. On Saturday, March 6, 1937, the fires were still burning, although no new fires were built that day. These fires consisted principally of piles of logs which had burned out to a considerable extent. They were raked down on Saturday morning to the end that they might be completely burned out by the time the crew was to leave the job at 11 a. m. However, the result was not fully accomplished. The crew did leave the job at 11 a. m. Saturday, March 6, 1937, with some of the fires still burning. No watchman was left in the vicinity, and the crew did not return to the job until early Monday morning, March 8, 1937. The winds in the vicinity were variable in direction but were strong enough to spread fires if they should be left unguarded as they were on the afternoon, evening, and night of March 6, 1937. Although n oone knew the exact time of the burning, as the same was not discovered until the next day, the plaintiffs' cabin and the furnishings therein were totally destroyed by fire during the evening or night of March 6, 1937.

8. The value of the cabin and furnishings therein on Mar. 6, 1937, was $790.00.

The court decided that the plaintiffs were entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to the court under an Act of Congress approved July 24, 1941, conferring jurisdiction "to hear,

determine, and render judgment on the claim of R. Brinskelle and Charlie Melcher for damages for loss of a fishing cabin on or about March 6, 1937, because of fire allegedly caused by negligence of Government employees in connection with clearing operations along the banks of the Warrior River and its tributaries". 55 Stat. 944.

Jurisdiction is especially conferred upon this Court to hear and determine a case sounding in tort. The case is based on negligence and the burden of proof is on the parties alleging negligence. It is also necessary for the plaintiffs to show that the negligent act of the defendant's employees was the proximate cause of the destruction of the cabin.

The evidence in the case is not very satisfactory. It appears that the cabin was situated at or near the top of a wooded hill which extended upward and northwestward from Chichester Slough on Hurricane Creek near the point where Hurricane Creek empties into Warrior River, the cabin being about 450 feet from the edge of this slough.

On March 6, 1937, and for some time prior thereto, the defendant was clearing the banks of, and the land adjacent to, Hurricane Creek and Warrior River in the vicinity of the cabin, and was burning the logs from the trees which had been cut down and also the brush, dead foliage, and other inflammable materials. The work was being done in anticipation of the raising of Lock 17 on Warrior River and the inundation of the land being cleared.

On March 5, 1937, the day before the fire which allegedly burnt the cabin, several fires built by the defendant's crew were burning along the banks and in the area adjacent to Chichester Slough, a short distance from the plaintiffs' cabin. The fires were still burning when the crew left the job about an hour before noon on Saturday, March 6, 1937. Previous to leaving, the crew raked down the burning logs so that they would be completely burned out before they left; however, this was not accomplished before they departed. On week nights a night watchman was always left on duty but on this Saturday night, March 6, 1937, there was no watchman on duty.

The winds in the vicinity were variable in direction but were strong enough to spread a fire. No one saw the cabin burn.

The direct evidence in the case is that witnesses saw the hillside between the slough and the cabin burning and the next morning the area around the cabin was burnt over. Plaintiffs' cabin and all the furnishings were totally destroyed.

The evidence is purely circumstantial so far as the actual burning of the cabin is concerned but it is a fair assumption that the fire burning on the side of the hill was caused by the burning logs which had been scattered by the defendant's crew before it left on the morning of March 6, 1937, and was the proximate cause of the burning of the cabin and its contents.

The defendant claims that the fire was caused by moonshiners who had a still not very far from the cabin and also claim that it was the custom of moonshiners to burn the brush in the neighboring area so as to disguise the smoke from the still.

The only evidence to substantiate the charge that a fire from the still caused the burning of the cabin is the fact that the sides of some of the trees towards the still were charred and some of the underbrush towards the still had been burnt. All that is shown is that the ground was cleared around that section by a fire. This is purely a presumption and the weakest of circumstantial evidence.

One would have to assume that the still was operated that night; that a fire had been started by the moonshiners to disguise the operation of the still; and also that these moonshiners were negligent in letting the fire get away from them, and, as a result thereof, the cabin was burned. It is an assumption upon a presumption which we are unwilling to make.

We feel that the plaintiffs have borne the burden of proof, and that the negligence of the defendant's employees in not putting out the fires by the slough on the defendant's property, or having a watchman remain until the fires were out, was the proximate cause of the burning of the cabin and its contents.

There is now the question of the amount of the loss. The cabin was built by plaintiffs some nine or ten years before the fire. It contained three rooms and two porches. We think a fair value for the cabin and its furnishings on March 6, 1937, taking into consideration depreciation on the cabin for nine years, is $790.00.

Plaintiffs are entitled to recover $790.00 It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

GLENWOOD L. COOK v. THE UNITED STATES

[No. 45515. Decided June 5, 1944]

On the Proofs

Pay and allowances; Navy officer serving under temporary appointment not entitled to retired pay.—An acting assistant surgeon of the Navy, serving under a temporary appointment under the provisions of the act of Congress of May 4, 1898 (U. S. Code, Title 34, section 21), is not entitled to retirement for physical disability incurred as an incident of the service under the provisions of sections 411, 415, 416, 417 of Title 34, U. S. Code.

Same; erroneous action, contrary to law, subject to revocation.—Where the actions taken by the Navy Department, the Naval Retirement Board and the President at the instance of the Secretary of the Navy, under which plaintiff was placed on the retired list, were erroneous and not in accordance with law, the Secretary of the Navy had a right later to correct the mistake since plaintiff's appointment was subject to the pleasure of the Secretary. See *Franke B. Robbins, Executrix* v. *United States*, 98 C. Cls. 479.

Same.—It is *held* that in the instant case the Secretary of the Navy was correct in his decision that plaintiff, an acting assistant surgeon serving under a temporary appointment, was not eligible to retire on three-fourths of his active duty pay, and the Secretary properly and legally revoked the erroneous notice to plaintiff by which plaintiff was advised that he had been placed on the retired list of the Navy.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff. *King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff sues to recover retired pay from July 1, 1941, to date of judgment, which he claims is due him as a retired lieutenant, junior grade, United States Navy, with less than three years' service.

The only question in the case is whether plaintiff, who was given a temporary appointment in 1939 as acting assistant surgeon in the Navy, is entitled to retirement under the laws relating to the retirement of officers of the Navy for physical disability incurred as an incident of the service.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. August 16, 1939, plaintiff was appointed an acting assistant surgeon in the United States Navy with the rank of lieutenant, junior grade, from August 15, 1939. It was specifically stated in the appointment "This appointment to continue in force during the pleasure of the Secretary of the Navy." Plaintiff accepted the appointment August 21, 1939.

2. The register of commissioned and warrant officers of the United States Navy and Marine Corps, July 1, 1940, page 298, lists the plaintiff as an acting assistant surgeon appointed for temporary service under the provisions of an act of Congress approved May 4, 1898.

3. February 29, 1940, while serving as an acting assistant surgeon (interne) at the Norfolk Naval Hospital, Portsmouth, Virginia, plaintiff requested the Chief of the Bureau of Medicine and Surgery for authority to appear for examination to be held May 6, 1940, for appointment in the grade of assistant surgeon with rank of lieutenant, junior grade, in the Medical Corps, United States Navy. This authority was granted March 7, 1940, but plaintiff never took the examination.

4. October 24, 1940, the Secretary of the Navy directed that, when notified by the President, Naval Retiring Board, Denver, Colorado, plaintiff should report to that official for examination for retirement in conformity with provisions of the U. S. Code, Title 34, Section 411. Plaintiff was also directed, upon completion of examination, to continue treat-

ment at the Fitzsimons General Hospital, Denver, Colorado. Subsequently, as directed by the Secretary of the Navy, plaintiff appeared before a Naval Retiring Board which found that he was incapacitated for service by reason of physical disability, incapacity permanent and incident to the service.

5. February 26, 1941, the President of the United States approved the proceedings and findings of the Naval Retiring Board in plaintiff's case.

6. March 12, 1941, plaintiff was advised by the Secretary of the Navy of the proceedings and findings of the Naval Retiring Board in his case and the action which was taken thereon by the President. He was further advised that he was placed on the retired list on March 1, 1941, pursuant to the provisions of U. S. Code, Title 34, Section 417, and Title 5, Section 47 (a).

7. May 2, 1941, the Secretary of the Navy addressed the following letter to plaintiff:

> 1. In view of the fact that you are serving under an appointment as an Acting Assistant Surgeon in the Navy and that the statutes do not provide for the retirement of officers of that status, the action of the Secretary of the Navy advising you that you were placed on the retired list of the Navy on March 1, 1941, is null and void.
>
> 2. It is requested, therefore, that reference (a) be returned to the Department for cancellation.
>
> 3. The revocation of your appointment, effective on July 1, 1941, is being accomplished in a separate letter.

8. The Secretary of the Navy on May 2, 1941, further advised plaintiff as follows:

> In view of the report of the Board of Medical Survey of September 25, 1940, which found you physically unfit for service, your appointment as an Acting Assistant Surgeon in the Navy, is revoked, effective July 1, 1941, on which date you will regard yourself as having been honorably discharged from the naval service.

9. Since 1915 the Navy Department has taken the position that acting assistant surgeons are not entitled to retirement, and it has been the practice of the Department not to retire them. Acting assistant surgeons of the Navy are carried on the rolls in a status somewhat similar to that of contract

surgeons of the Army. They have the rank, duties, and authority of commissioned officers of the Navy and are subject to trial by General Courts Martial.

Acting assistant surgeons have always been appointed to and discharged from the Navy in the discretion of the Executive. It has been customary for the Navy Department to revoke the appointment of an acting assistant surgeon when he becomes physically disqualified for active service.

10. Through an administrative oversight, due to the fact that assistant surgeons of the Navy and acting assistant surgeons have the same designation of lieutenant, junior grade, Medical Corps, United States Navy, the Bureau of Navigation (now the Bureau of Personnel) directed plaintiff to appear before a Naval Retiring Board for examination for retirement. Without any other designation to indicate plaintiff's actual status as an acting assistant surgeon, his designation as a lieutenant, junior grade, United States Navy, was continued until the Bureau of Navigation discovered the error and prepared a letter for the signature of the Secretary of the Navy, advising plaintiff that since the statutes do not provide for the retirement of officers of his status, the action of the Secretary of the Navy informing him that he had been placed on the retired list was null and void.

It is not shown that the President took any further action in connection with the plaintiff's case after he approved the proceedings and findings of the Naval Retiring Board on February 26, 1941.

11. On July 22, 1941, while this suit was pending, plaintiff filed application with the Veterans' Administration for pension benefits on account of military service from August 15, 1939 to July 1, 1941. December 31, 1942, the Veterans' Administration determined that plaintiff's disabilities, which were diagnosed as tuberculosis, pulmonary, chronic, were incurred in service performed other than in time of war and were disabling to a 70 percent degree, effective July 22, 1941, the date he filed claim for such benefits, and awarded him a pension of $52.50 a month from said date. April 10, 1943, this pension award was increased in the amount of $15 a month.

12. Plaintiff was paid currently active-duty pay and allowances of a lieutenant, junior grade, to include March 31, 1941. Subsequently such pay and allowances for the month of March 1941 were recovered. Plaintiff thereafter received retired pay from March 1 to June 30, 1941, at the rate of $125 a month. Plaintiff has not received any retired pay subsequent to June 30, 1941.

If plaintiff is entitled to receive retired pay of a lieutenant, junior grade, with less than three years' service, from July 1 to December 31, 1941, there would be due him the sum of $750, as computed by the General Accounting Office.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In August 1939 the President appointed plaintiff an acting assistant surgeon in the Navy for temporary service under the act of May 4, 1898 (30 Stat. 369, 380; U. S. Code, Title 34, section 21). The appointment specifically stated: "This appointment to continue in force during the pleasure of the Secretary of the Navy." While serving under this appointment plaintiff became incapacitated as a result of an incident of the service, and he was examined for retirement and was placed on the retired list of officers of the Navy as of March 1, 1941, as set forth in findings 3 to 6, inclusive. This action, however, so far as concerned acting assistant surgeons, was not in accordance with the established and consistent policy of the Navy Department but was due to an administrative oversight, as set forth in findings 9 and 10. As a result, the Secretary of the Navy advised plaintiff that his action of March 12 advising plaintiff that he was placed on the retired list as of March 1 was "null and void." (Findings 7 and 8).

Plaintiff contends that he was an officer of the Navy subject to retirement under the provisions of law relating to the retirement of "any officer" of the Navy. He further insists that when the President approved the findings of the retiring board and ordered plaintiff placed on the retired list, his retirement was a completed act, and that if an officer

holding a temporary appointment is entitled to retirement plaintiff is now, and has been since March 1, 1941, legally on the retired list and is entitled to retired pay.

If the actions taken by the Navy Department, the Naval Retiring Board, and the President at the instance of the Secretary of the Navy, under which plaintiff was placed on the retired list, were erroneous and not in accordance with law, the Secretary of the Navy had a right later to correct the mistake since plaintiff's appointment was subject to the pleasure of the Secretary. See *Franke B. Robbins, Executrix*, v. *United States*, 98 C. Cls. 479. In view of the facts in this case, the provisions of law providing for temporary appointment of acting assistant surgeons, the consistent and long-continued interpretation by the Navy Department of the nonapplicability of the retirement laws to such appointments, and the provision of law enacted in 1935 specifically relating to retirement of acting assistant surgeons upon reaching the age of seventy years, we are of opinion that plaintiff was not eligible for retirement and is therefore not entitled to recover.

Section 1 of the act of May 24, 1828 (4 Stat. 313), provided for appointment of assistant surgeons of the Navy only after examination and recommendation by a board of naval surgeons, and that practice has ever since been required (finding 3). Such officers hold permanent appointments. Section 1411 Rev. Stat. (sec. 6, act of March 3, 1865), provided that "The Secretary of the Navy may appoint, for temporary service, such acting assistant surgeons as the exigencies of the service may require, who shall receive the compensation of assistant surgeons." Section 6, act of February 15, 1879 (20 Stat. 295), provided that from that date "the Secretary of the Navy shall not appoint acting assistant surgeons for temporary service," as authorized by section 1411, R. S., "except in case of war." The act of May 4, 1898, 30 Stat. 369, 380 (U. S. Code, Title 34, sec. 21), provided that "The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons who shall have the relative rank and compensation of assistant surgeons." Plaintiff was appointed under this

statute. By amendment of March 18, 1940 (54 Stat. 54), the number of acting assistant surgeons was increased to one hundred, and, by a further amendment of March 17, 1941 (55 Stat. 43; U. S. Code, Title 34, sec. 21), it was provided "That the Secretary of the Navy may appoint in time of war or national emergency declared by the President to exist, for temporary service, such acting assistant surgeons as the exigencies of the service may require, who shall receive the compensation of assistant surgeons."

U. S. Code, Title 34, sections 411, 415, 416, and 417 contain the provisions of law relating to the retirement of "any officer" of the Navy for incapacity incurred as a result of an incident of the service when the findings of a Navy board are approved by the President. These provisions of law have been in force for many years and have always been interpreted as applying only to commissioned officers of the regular Navy, and, so far as appears, no acting assistant surgeon holding a temporary appointment has ever before this case been examined by the Navy Retiring Board or placed on the retired list under these retirement laws.

In recognition and approval of the consistent interpretation by the Navy Department of the retirement laws as not being applicable to acting assistant surgeons temporarily appointed by either the President or the Secretary of the Navy, the Congress in the act of July 17, 1935 (49 Stat. 482; U. S. Code, Title 34, section 396a), entitled "An Act Directing the retirement of acting assistant surgeons of the United States Navy * * *", provided that "The acting assistant surgeons of the United States Navy who, on the date of the passage of this act, have reached the age of seventy years shall be placed on the retired list of the Navy with pay at the rate of three-fourths of their active duty pay." This act was passed to permit the retirement of two acting assistant surgeons who were more than seventy years of age and who had served in that capacity for 29 and 36 years, respectively. The reason for its enactment, as stated in the Committee Report and on the floor of the Senate, was that the existing provisions of the retirement laws did not apply to acting assistant surgeons appointed for

temporary service. This would seem to negative plaintiff's claim to retirement under other provisions of law which, we think, relate to officers of the regular Navy holding permanent commissions. *Taylor* v. *United States*, 38 C. Cls. 155, 161, 162. Compare *United States* v. *Johnston*, 124 U. S. 236; *Robertson* v. *Downing*, 127 U. S. 607, 612; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339.

Revised Statutes, sections 4692 and 4693; U. S. Code, Title 38, sections 151 and 152, provide for pensions for officers and enlisted men of the Army and Navy who are not receiving active-duty or retirement pay. (See section 422, U. S. Code, Title 38.) Plaintiff has been receiving a pension under these sections since July 22, 1941, in the amount of $52.50 a month to April 10, 1943, and $67.50 a month subsequently (finding 11). Section 151, U. S. Code, *supra*, provides that "Every person specified in the several classes enumerated in section 152 * * * who has been, since the 4th day of March 1861, or who is hereafter disabled under the conditions therein stated, shall, upon making due proof of the fact * * * be placed on the list of invalid pensioners of the United States * * *." Section 152, *supra*, provides that "The persons entitled as beneficiaries under section 151 * * * as follows: * * *. (4) *Acting assistant surgeon.*—Any acting assistant or contract surgeon disabled by any wound or injury received or disease contracted in the line of duty while actually performing the duties of assistant surgeon or acting assistant surgeon with any military force in the field, or in transitu, or in hospital."

We think the Secretary of the Navy was correct in his decision that plaintiff was not entitled to retirement on three-fourths of his active-duty pay, and that he properly and legally revoked the erroneous notice to plaintiff by which he was advised that he had been placed on the retired list of officers of the Navy.

The petition is therefore dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge*, and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CARAVEL INDUSTRIES CORPORATION, A CORPORATION, v. THE UNITED STATES

[No. 45334. Decided June 5, 1944]

On the Proofs

Government contract; agreed time for performance begins to run from date of contract.—Under a contract dated January 8, in which it was stated that the contract period was January 8–March 16, where the contract was signed by the plaintiff on January 29 and by the Government on February 8, the agreed time for performance began to run on the date of the contract and not on the date when it was signed by the Government.

Same; liquidated damages for late delivery of goods under relet contracts.—Where the Government terminated a contract, in accordance with its provisions, for late delivery of goods called for by the contract, but permitted plaintiff to complete the manufacture of goods in process and goods for which material had been purchased, and secured the balance under new contracts with other suppliers; and where the contract expressly provided that if the plaintiff did not furnish the goods within the agreed time, the Government might procure the goods from other suppliers and charge the plaintiff with liquidated damages for any delay in so procuring them; it is *held* that plaintiff is not entitled to recover liquidated damages assessed for lateness of delivery of the goods obtained under the relet contracts.

Same.—The Government was just as much inconvenienced by late deliveries from the manufacturers to which the contracts were relet, as to the goods obtained from them, as it would have been by late deliveries by the plaintiff, hence there is no reason for giving the contract a strict construction which would leave the Government without remedy for delay in procuring the goods from other suppliers merely because it chose to permit plaintiff to supply some of the goods after the performance period had expired, and procured only the balance of the goods, rather than all the goods, from other suppliers.

The Reporter's statement of the case:

Mr. Challen B. Ellis for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and during the period involved herein was, a New York corporation with its principal place of business in New York City.

2. December 5, 1934, the defendant advertised for bids for 1,750,000 pairs of cotton drawers (shorts), the bids to be opened at the Philadelphia Quartermaster Depot, Philadelphia, Pennsylvania, January 4, 1935. The invitation set out the quantities and sizes which were to be delivered at the New York, Philadelphia, Chicago, 8th Corps Area, and San Francisco Depots, and set out the following requirements with respect to delivery and time of performance:

> DELIVERY REQUIREMENTS.—Deliveries are to commence at the earliest practicable date, with frequent periodical deliveries until completion. COMPLETE AND FINAL DELIVERY MUST POSITIVELY BE EFFECTED WITHIN SIXTY-SEVEN (67) DAYS FROM RECEIPT OF NOTIFICATION OF AWARD. All calendar days are counted.
>
> Bidders are informed that the term "DELIVERY" is interpreted to mean the receipt, at destination depot, of acceptable articles.
>
> The Government reserves the right to purchase elsewhere any part undelivered within the time specified in the delivery schedule of the contractor, and excess cost, if any, will be charged to the contractor.
>
> TIME OF PERFORMANCE.—Bidders will state in the blank spaces provided therefor, the least number of calendar days (counting Sundays and holidays) after date of receipt of notice of award in which they will complete performance. In stating the time for deliveries, bidders should make allowances for both probable and unforeseen difficulties that may be encountered and they should make no promises they are not positive, beyond question, that they can fulfill, as they will be held strictly and absolutely to the schedule of deliveries offered by them.

3. In response to this invitation, plaintiff, on January 3, 1935, submitted a bid on a total of 360,000 pairs of shorts at a price of $0.2923 per pair for those to be delivered at the New York and Philadelphia Depots, $0.2973 at the Chicago Depot, $0.3023 at the 8th Corps Area Depot, and $0.3093 at the San Francisco Depot. The bid further specified that 35 percent of the amount required at each depot would be delivered in 30 days "after receipt of notification of award" and that subsequent deliveries would be made at the rate of 12½ percent each 7 days thereafter.

4. January 5, 1935, the defendant notified plaintiff by telegram that a contract was awarded to it for the furnishing of

360,000 pairs of shorts. The telegram further stated that a letter followed. On the same day the contracting officer at the Philadelphia Quartermaster Depot sent plaintiff a letter which read as follows:

> Your proposal, dated January 3, 1935, received in response to Invitation for Bids No. 669-35-208, has been accepted and award is made you for furnishing and delivering at the depots indicated, the following:
>
> DRAWERS (Shorts) Cotton, to conform in all respects to requirements of U. S. Army Specification No. 6-188, dated September 13, 1933, with exceptions noted in the Proposal:
>
> 105,000 pr. f. o. b. New York General Depot @ $.2923 per pr. Sizes: 210/28; 2,100/30; 37,800/32; 33,600/34; 16,695/36; 8,085/38; 4,095/40; 1,260/42; 735/44; 315/46; 105/48.
>
> 147,500 pr. f. o. b. Philadelphia Q. M. Depot @ $.2923 per pr. Sizes: 47,200/34; 41,581/36; 42,143/38; 8,934/40; 3,933/42; 3,653/44; 56/48.
>
> 107,500 pr. f. o. b. Chicago Q. M. Depot . . . @ $.2973 per pr. Sizes: 215/28; 2,150/30; 38,700/32; 34,400/34; 17,093/36; 8,277/38; 4,193/40; 1,290/42; 752/44; 323/46; 107/48.
>
> Contract will be numbered W 669-ECF 400, dated January 8, 1935, and will provide for deliveries as follows:
>
> 35% to each depot within 30 days from date of contract not less than 12½% each 7 days thereafter, to complete the quantity contracted for within 67 days.
>
> Contract will provide for a variation of 3% under the terms and conditions of Article 7 of the contract. This amount must not be exceeded.
>
> Please observe the requirements for packing and marking given on Sheet No. 12 of Invitation for Bids No. 669-35-208, which must be closely followed.
>
> It is requested that three sample pair of Drawers be forwarded to this depot for examination before going into quantity production.
>
> Invoices should be sent by you to the Finance Officer, U. S. Army, 21st and Johnston Sts., Phila., Pa. Performance bond in the amount of approximately 20% of the contract amount will be required under this contract. This is your authority to proceed with the work pending the execution of formal contract papers which will be forwarded to you for signature as soon as they can be prepared. Please acknowledge receipt.

January 7, 1935, plaintiff replied to that letter as follows:

We acknowledge receipt of your order of January 5th for which please accept our thanks. We were in touch with your Depot by telephone today asking that the patterns, or at least some of the patterns, be forwarded as early as possible so that we may proceed with the production of the three sample pairs for examination before going into quantity production.

5. January 24, 1935, the defendant forwarded to plaintiff for signature the formal written contract dated January 8, 1935. It had on its face the statement "Contract Period: January 8, 1935–March 16, 1935." Plaintiff signed the contract January 29, 1935, and forwarded it to the defendant on that date together with its performance bond. Thereafter, the defendant signed the contract and forwarded it to plaintiff on February 12, 1935, with a notation stamped on the outside "Execution completed Feb. 8, 1935." Plaintiff received the executed contract February 13, 1935. The contract, specifications, schedule of supplies, bid, and performance bond, plaintiff's Exhibit 1, are made a part hereof by reference.

6. The contract provided for the furnishing by plaintiff of 360,000 pairs of cotton drawers (shorts), in the quantities and sizes, at the prices, and to the Quartermaster Depots mentioned in the schedule of supplies attached to the contract, for a total consideration based on such unit prices of $105,765.50.

The quantities and unit prices for the several depots were as follows:

New York General Depot: 105,000 pr. @ $.2923	$30, 691. 50
Philadelphia Quartermaster Depot: 147,500 pr. @ $.2923	43, 114. 25
Chicago Quartermaster Depot: 107,500 pr. @ $.2973	31, 959. 75
	105, 765. 50

The prices were f. o. b. the depots named where final inspection and acceptance were to be made. Article 1 of the contract stated that deliveries were to be made as follows:

Thirty-five percentum (35%) within thirty (30) days after date of this contract and not less than twelve and one-half percentum (12½%) each seven (7) days thereafter to complete the quantity contracted for within sixty-seven (67) days, after date of this contract.

The contract contained the following provision with respect to delays:

ARTICLE 15. *Delays—Liquidated damages.*—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified in Article 1, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery, the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: *Provided, however,* That the Government reserves the right to terminate the right of the contractor to proceed and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: *Provided further,* That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors: *Provided further,* That the contractor shall, within ten days from the beginning of any such delay, notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of the delay and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

The amount of liquidated damages provided under the above Article 15 was as follows:

LIQUIDATED DAMAGE.—Under the terms and conditions stipulated in Article 15 of this contract, the contractor shall pay to the Government, as liquidated damages, for each unit undelivered, a sum equal to one-fifth of one

percentum (1/5 of 1%) of the price of each unit for each day's delay after the date or dates specified.

7. The specifications contained the following requirement with respect to patterns:

> Standard patterns will be furnished by the United States; these patterns provide for an allowance of 3/8 inch for all seams and are to be used as a guide for cutting the contractor's working patterns. The working patterns are to be identical to the standard patterns. Piecing, skimping, or altering of patterns is strictly forbidden. The garments are to be cut in strict accordance to the patterns.

The invitation for bids specified that—

> The *successful bidder* will be required to submit to the Contracting Officer, Philadelphia Quartermaster Depot, 21st and Johnston Streets, Philadelphia, Pa., a finished sample pair of Drawers for examination and test, in addition to one for each destination depot awarded.

As shown in finding 4, plaintiff, on January 7, 1935, requested that the defendant forward patterns in order that it might proceed with the production of three sample pairs for examination before going into quantity production. The defendant forwarded the patterns January 8, 1935, and plaintiff received them January 12, 1935.

8. January 19, 1935, plaintiff sent four sample pairs of shorts to the defendant for approval and a two-yard swatch of broadcloth, at which time plaintiff stated that it would appreciate a test being made of the cloth by the defendant as to its compliance with the specifications preliminary to production. These shorts were produced by the Dillon-Vitt Underwear Company. January 24, 1935, the defendant notified plaintiff by telegram that the sample of cloth was satisfactory but that the samples of shorts were unsatisfactory for various reasons and asked that new samples be submitted.

January 23, 1935, plaintiff forwarded three sample garments from another of its subcontractors, Bob & Goldfarb, and asked for approval so that production could be started at that plant. January 31, 1935, plaintiff submitted two sample garments from still another of its subcontractors and asked for their inspection. Those submitted January 31, 1935, were rejected by the defendant February 1, 1935, as

unsatisfactory. February 13, 1935, the defendant notified plaintiff by letter as follows:

GENTLEMEN:

Three (3) pairs of drawers, shorts, cotton, submitted by Inspector Goodman and received in this Depot February 8th, have been tested and found satisfactory.

One pair each is being forwarded to the New York General Depot and the Chicago Quartermaster Depot to be used as a guide in the inspection of your deliveries at the above Depots.

Invoices in proper form should be rendered to the Finance Officer, U. S. Army, 21st & Johnston Streets, Phila., Pa., for two (2) pairs of drawers, shorts, cotton, size 34. The other pair is required, under the terms of your contract, to be forwarded to this Depot for test purposes and no payment will be made therefor.

Very truly yours,

ALBERT E. DENNIS,
2nd Lieut. Q. M. C.

NOTICE.—Contractors are warned that acceptance or approval of tendered samples of finished articles or of material in course of manufacture is not to be construed by implication or otherwise to be a guaranty of the acceptability of deliveries to be made subsequent thereto. An acceptable result, on test at this depot of preliminary or inspector's samples for conformity to specification, does not free the contractor from the responsibility, under the terms of his contract, of delivering merchandise conforming in every respect to the specification requirements. Tests made apply only to the tested samples; this depot assuming no responsibility for the balance of lot or shipment from which samples may be alleged to have been drawn.

Inspector Goodman, referred to in the above letter, was an inspector of defendant stationed at the plant of Bob & Goldfarb, a subcontractor for plaintiff.

9. The invitation for bids contained the following provision with respect to the names and locations of factories where the work covered by the contract was to be performed.

NAMES AND LOCATIONS OF FACTORIES.—Bidders must state in the spaces provided below, names and locations of the factories where manufacture of the item bid upon will be performed. The performing of any of the work contracted for in any place other than that named in the

bid is prohibited, unless the same is specifically approved in advance by the Contracting Officer.

Pursuant to that provision, plaintiff listed in its bid the Marvel Underwear Company, National Underwear Company, and Dillon-Vitt Underwear Company. January 7, 1935, the defendant sent a telegram to plaintiff asking which of the factories listed in the bid would be used to manufacture the garments, stating that inspectors would be sent to the plants named. The following day plaintiff replied that it was working out a production schedule and would furnish the information requested very promptly. January 28, 1935, plaintiff requested permission to manufacture 75,000 of the garments at the plant of Bob & Goldfarb. That permission was granted about February 1, 1935, and on that day an inspector was assigned to that plant. January 31, 1935, plaintiff requested permission to manufacture 100,000 of the garments at the plant of Penn State Underwear Mills in place of the National Underwear Company. That permission was granted by the defendant February 1, 1935, and an inspector was assigned to that plant February 4, 1935. February 14, 1935, plaintiff requested permission to manufacture 50,000 garments at the plant of the Lenton Corporation. That permission was granted February 15, 1935, and the defendant assigned an inspector to that plant February 26, 1935. The only plant listed by plaintiff in its bid which made garments for plaintiff under the contract in question was that of Dillon-Vitt Underwear Company. The defendant assigned an inspector to that plant January 24, 1935.

10. January 14, 1935, plaintiff gave an order to Dillon-Vitt Underwear Company to manufacture 150,000 pairs of shorts under the contract involved in this suit, such garments to be delivered in weekly installments of approximately 2,500 dozen, the total delivery to be completed by March 22, 1935. The order further stated:

> It is understood of course that these goods are being manufactured for use for the United States Government pursuant to an award made to us and is subject to all the terms and conditions and specifications with the order and to the acception and retention of the garments, and payment therefor by the United States Government. The Government is to be allowed the privilege of keep-

ing at its own expense an inspector at the factory to check the production and delivery of the shorts called for under the order.

It also stated that there had been mailed samples of cloth, tape, and buttons to be used in the production of approximately one dozen garments which the plaintiff was to submit for approval before actual production was begun. January 19, 1935, plaintiff advised the defendant that 150,000 pairs of the garments would be produced at the plant of the Dillon-Vitt Underwear Company.

January 30, 1935, plaintiff placed an order with the Penn State Underwear Mills for the manufacture of 100,000 pairs of shorts, such garments to be delivered in weekly installments of approximately 1,000 dozen, and the total quantity to be delivered within ten weeks from the date of the receipt of piece goods. That order contained a provision similar to the one quoted above from the Dillon-Vitt Underwear Company order, stated that plaintiff was to deliver cloth, etc., within five days from the date Penn State Underwear Mills signed it, and said that if there was any delay on plaintiff's part the Penn State Mills would be granted an appropriate extension of time. Penn State Mills signed the contract February 2, 1935.

11. Production of the shorts started at the plant of Bob & Goldfarb on January 30, 1935. Material for the shorts arrived at the Penn State Mills on February 7, 1935, and production started there on that day. Production started at the plant of the Dillon-Vitt Underwear Company on February 8, 1935, and at the plant of the Lenton Corporation on March 6, 1935. Except for the forwarding of samples, no delivery of shorts was made by plaintiff or any of its subcontractors prior to February 8, 1935.

12. The shorts made under the contract in suit were of the same type as those made for the Government in 1917 and 1918 during the First World War, and during the years 1933 and 1934. They were like commercial shorts except that they had reenforced seats. They were practical garments and could be made in factory production. Since 1917, the Government has had 25 or 30 million of these garments manufactured for it.

13. As shown in findings 4 and 5, the contract involved in this suit was dated January 8, 1935, although its execution was not completed until February 8, 1935. The period allowed for performance under the contract was sixty-seven days, which period was shown on the face of the contract as running from January 8, 1935, to March 16, 1935. By March 16, 1935, plaintiff had delivered to the three depots the following number of acceptable garments:

New York General Depot	12,961
Philadelphia Quartermaster Depot	14,984
Chicago Quartermaster Depot	1

By April 4, 1935, plaintiff had delivered a total of 108,401 acceptable garments to the three depots out of the total of 360,000 contracted for.

14. April 4, 1935, the Government sent plaintiff the following letter:

> Due to serious delinquencies in your deliveries of Drawers (Shorts), cotton, to the New York General Depot, Chicago Quartermaster Depot, and Philadelphia Quartermaster Depot, under Contract No. W 669 ECF 400, dated January 8, 1935, and confirming telegram of this date, formal notice is hereby given you of the termination, under Article 15 of the Contract, of your right to deliver 124,430 pairs.
>
> To meet urgent requirements of the Government, this quantity of Drawers is being purchased in the open market by this office; any and all excess cost incurred thereby will be charged to your account as provided by the terms of your contract. The quantities by sizes for each of these three depots are as follows:
>
> [Here follow tabulations by sizes and numbers which make up the quantity for each depot as follows: New York General Depot 24,771, Chicago Quartermaster Depot 29,652, and Philadelphia Quartermaster Depot 70,007.]
>
> In determining the quantity stated, all shipments made by you and all drawers in process of manufacture including cuttings made in your factories as reported by the Government inspectors at your subcontractors' plants on April 2, 1935, have been considered.
>
> Please acknowledge receipt.

15. In order to obtain the 124,430 garments mentioned in the letter set out in the preceding finding, the defendant entered into the following contracts:

(a) A contract with the B. V. D. Sales, Inc., dated April 8, 1935, for 94,778 garments of which 24,771 were to be delivered to the New York General Depot @ $0.295 per pair; 54,429 to the Philadelphia Quartermaster Depot @ $0.294 per pair; and 15,578 to the Philadelphia Quartermaster Depot @ $0.299 per pair. Deliveries were to be made during the period April 8, 1935, to June 17, 1935. Under the terms of this contract, defendant accepted 24,756 garments delivered to the New York General Depot during the period April 20, 1935, to June 14, 1935, and 70,019 garments delivered to the Philadelphia Quartermaster Depot during the period May 4, 1935, to July 29, 1935, that is, a total of 94,775 garments.

(b) A contract with the Nuckasee Manufacturing Company dated April 8, 1935, for 25,000 garments at the price of $0.286 per pair to be delivered to the Chicago Quartermaster Depot, deliveries to be made of 4,000 garments within five weeks after the date of contract and not less than 4,000 each week thereafter to complete the quantity contracted for within seventy days after the date of the contract. Under the terms of this contract, the defendant accepted 25,107 garments during the period May 8, 1935, to June 27, 1935.

(c) A contract with the Reliance Manufacturing Company dated April 8, 1935, for 75,390 garments at a price of $0.295 per pair, of which 4,652 were purchased to supply the delinquency against plaintiff's contract involved in this suit and 70,738 against a contract not involved in this proceeding. All garments involved in this contract were to be delivered to the Chicago Quartermaster Depot, delivery to be made of 12,000 garments within fourteen days after the date of the contract and 18,000 garments each seven days thereafter until the quantity contracted for was completed. Under the terms of this contract, the defendant accepted 4,514 garments delivered to the Chicago Quartermaster Depot by this contractor during the period May 4, 1935, to May 29, 1935.

The garments delivered under the three relet contracts mentioned in this finding were of the same type as those accepted under plaintiff's contract, and they were delivered during the respective contract performance times set in the relet contracts.

16. When plaintiff's right to deliver the 124,430 garments was terminated on April 4, 1935, all shipments and garments then in the process of manufacture, including cuttings made up to that time by plaintiff, were taken into consideration by the defendant. Plaintiff continued to deliver these garments until December 9, 1935. The total deliveries of garments under plaintiff's contract and the three relet contracts referred to in the preceding finding were as follows:

Delivered by plaintiff up to April 4, 1935	108,401
Delivered by plaintiff April 5, 1935, to December 9, 1935	130,942
Delivered under relet contracts	124,396
Total	363,739

17. Subsequent to the completion of the deliveries set out in the preceding finding, the defendant made an audit of the financial aspects of the contract involved in this suit and found an outstanding indebtedness due from plaintiff which arose primarily on account of the assessment of liquidated damages. The defendant made that determination on the basis that the contract period began January 8, 1935, and that since sixty-seven days were allowed for making deliveries of the 360,000 garments, all of the deliveries should have been completed by March 16, 1935. The defendant also proceeded on the basis that liquidated damages did not cease upon the termination of plaintiff's right to complete deliveries under its contract but continued until the shorts were delivered by the substituted contractors. In advising plaintiff on December 1, 1936, of its action, the following explanation was given by the defendant:

> Detailed statements setting forth the calculations in support of this figure are attached, and it will be observed therefrom that the additional indebtedness results primarily from the assessment of liquidated damages after date of termination of your right to deliver certain supplies to the promised completion date offered by the substituted contractors for the delivery of the defaulted quantities. These calculations are based upon recent decisions rendered by the Comptroller General of the United States wherein it has been held that liquidated damages do not cease upon the date of termination of contractor's right to deliver, but continue until the date of completion promised by the substituted contractor.

18. On the basis that January 8, 1935, was the day after which the specified percentages of the garments were required to be delivered within the number of days specified in the contract, and that all deliveries were required to be completed by March 16, 1935, or 67 days after January 8, the defendant deducted $16,083.22 as liquidated damages because of the delay in furnishing the garments called for by the contract, which amount included liquidated damages of $6,392.12 deducted because of deliveries made under the relet contracts.

If the contract performance time was from February 8, 1935, to April 16, 1935, inclusive, the amount of liquidated damages assessable was $9,172.69, including liquidated damages of $4,154.20 deducted on deliveries made under the relet contracts.

19. Shortly after the termination on April 4, 1935, of plaintiff's right to complete deliveries under the contract involved in this suit and when it became known to plaintiff that liquidated damages were being assessed, plaintiff protested the deductions. In response to this protest plaintiff was advised by the Finance Officer, U. S. Army, Philadelphia, Pa., on September 12, 1935, that that office was without authority to make any refund on account of the liquidated damages which had been deducted but suggested that if plaintiff felt it was entitled to a refund it should file a claim with the Comptroller General of the United States, Washington, D. C., through the Commanding Officer, Philadelphia Quartermaster Depot, Philadelphia, Pa. Similar information was again furnished in letters to plaintiff from the Commanding Officer, Philadelphia Quartermaster Depot, and the Finance Officer at Philadelphia, Pa., on October 16, 1935, and November 18, 1935, respectively.

As a result of the protests filed by plaintiff, the audit referred to in finding 17 was made by the defendant on the basis of which plaintiff's claim for remission of liquidated damages was denied. February 12, 1940, the Comptroller General acted on a claim filed with him by plaintiff in which he held that liquidated damages in the amount of $16,083.22 were properly assessed against plaintiff on account of the contract involved in this suit.

20. Plaintiff has waived all claims listed in its petition, except its claim for the remission of liquidated damages.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff claims that the Government assessed more liquidated damages against the plaintiff than were properly assessable, and sues to recover that excess.

On January 3, 1935, the plaintiff, in response to an invitation for bids, submitted a bid for furnishing 360,000 pairs of cotton drawers or shorts to the War Department. As required by the invitation, the plaintiff stated in its bid the rate at which it would bind itself to make delivery of the shorts, if it should receive a contract. It set that rate as 35 percent of the total number within 30 days "after receipt of notification of award" and 12½ percent each 7 days thereafter.

On January 5 the Government telegraphed the plaintiff that it had been awarded the contract, and on the same day it wrote the plaintiff a letter stating that the contract would be dated January 8, and that the schedule of delivery which the plaintiff had promised in its bid would be measured from that date. The effect of this statement was to give the plaintiff three more days within which to perform the contract. This modification, to the plaintiff's advantage, of the term of its offer relating to delivery did not affect the validity of the Government's acceptance of the offer. At any rate, the plaintiff, on January 7, acknowledged, with thanks, the receipt of the order contained in the letter, and showed by that and other conduct that it was contracting on the basis of the letter.

The plaintiff was late in its deliveries. By February 8, the date set in the Government's letter for the delivery of 35 percent of the entire order, no shorts at all had been delivered. And deliveries after that time and within the agreed period did not make up the deficits. The only reasons appearing in the evidence for the delinquency were that the plaintiff had difficulty in making satisfactory arrangements with manufacturers for the manufacture of the shorts which it had promised, and was obliged to find manufacturers different, to a large extent, from those to whom it had intended, when

it made its bid, to give the orders; and that the samples which it was obliged by its contract to submit to the Government for approval before quantity production would begin, were submitted late and were, in most instances, rejected by the Government when first submitted.

The Government's letter of January 5, referred to above, and quoted in finding 4 said:

> This is your authority to proceed with the work pending the execution of formal contract papers which will be forwarded to you for signature as soon as they can be prepared.

The formal contract was sent January 24. It was dated January 8, as the letter had said it would be. It said "Contract period January 8, 1935–March 16, 1935." The plaintiff signed the contract on January 29 and returned it to the Government. It was signed by the Government February 8, and one signed copy was sent to the plaintiff on February 12. The plaintiff urges that the agreed time for performance did not begin to run until February 8, when the Government signed the contract. If the plaintiff is right, the amount of liquidated damages should have been $6,910.53 less than was assessed, and this is one item of the plaintiff's claim in this suit. The rate of liquidated damages provided in Article 15 of the contract, as shown in finding 6, was one-fifth of one percent of the price of each unit for each day's delay.

We do not agree with the plaintiff's contention. The correspondence by which the parties reached their agreement made it perfectly plain that deliveries were to be made by specified dates after January 8. The formal contract, when the plaintiff signed it on January 29, said the same thing in plain words. It is not possible to urge that the parties intended anything different. And we know of no doctrine whereby we may reform the contract to give it a meaning which the parties did not think it had. There is no equity in the plaintiff's position which would make a rewriting of the contract desirable. The delay in the preparation and execution of the formal contract had nothing whatever to do with the delay in the delivery of the goods. To hold that this irrelevant circumstance should have the effect of partially abrogating the agreement would serve no just purpose.

The plaintiff was warned in the invitation for bids, as shown in finding 2, not to make promises as to delivery dates unless it was positive it could perform them. It seems to have made its promise in disregard of this warning, and thus put itself in its present predicament.

The other count in the plaintiff's claim arises out of the fact that the Government, on April 4, 1935, terminated the plaintiff's contract as to 124,430 pairs of shorts. By April 4, which was about 20 days after the whole order of 360,000 pairs should have been delivered, the plaintiff had in fact delivered 108,401 pairs. Its manufacturers had in process of manufacture, or they or the plaintiff had had the cloth cut, for some 130,000 more. The number as to which the contract was terminated was the number not delivered and not in process of manufacture. These 130,000 pairs as to which the contract was not terminated were finally delivered by the plaintiff, the last of them on December 9, nine months after they were due. Those late deliveries account for a considerable assessment of liquidated damages, as to which the plaintiff does not complain.

The Government obtained the 124,430 pairs as to which it terminated the plaintiff's contract by entering into contracts with other manufacturers, each dated April 8, four days after it terminated the plaintiff's contract. The prices paid were substantially the same as those in the plaintiff's contract. These manufacturers delivered the shorts within their contract periods, the last of them being delivered July 29, which was some five months before the plaintiff completed delivery upon the part of the contract retained by it. Article 15 of the contract, quoted in finding 6, provided that if the plaintiff did not make delivery within the agreed time, the Government might terminate the contract and purchase the shorts in the open market, or secure the manufacture of them by contract or otherwise,

> charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: * * *

The liquidated damages assessed against the plaintiff included a sum computed upon the lateness of delivery, with

reference to the delivery dates promised in the plaintiff's contract, of the shorts obtained under the relet contracts. The plaintiff sues also for that sum, urging that the provision in the contract for liquidated damages should be strictly construed; that the text of the contract quoted above would have permitted the Government to terminate the contract completely, secure all of the shorts elsewhere, and charge the plaintiff with liquidated damages until they had been secured; but that since the Government permitted the plaintiff to continue with the deliveries of the 130,000 pairs which were in process at the time of termination, it had no right to charge liquidated damages at all for the late deliveries under the relet contracts. The construction urged would be not only strict, it would be destructive, without reason, of the purpose of the provision in the contract. The Government was just as much inconvenienced by late deliveries from the manufacturers to which the contracts were relet, as to the numbers of pairs of shorts obtained from them, as it would have been by late deliveries by the plaintiff. We see no reason why it should not have contracted, as it did, for some compensation for that inconvenience, nor why we should search for an escape from the effect of that contract. It was considerate of the Government to permit the plaintiff to go on and complete the shorts which were in process, and the plaintiff expressed no disagreement to the partial termination. We think this part of the liquidated damages was properly assessed.

The plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ROBERT LEE SCOTT v. THE UNITED STATES

[No. 46007. Decided June 5, 1944]

On Defendant's Motion to Dismiss

Statute of limitation.—Suit instituted in the Court of Claims by petition filed on October 29, 1943, on a claim which accrued not later than March 16, 1935, is barred by the statute of limitations, U. S. Code, Title 28, section 262.

Mr. Robert Lee Scott, *Pro se.*

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The facts sufficiently appear from the opinion of the court, *per curiam*, as follows:

Plaintiff instituted this suit by petition filed October 29, 1943, to recover $207.90 alleged to be due him by defendant. The facts alleged in the petition are as follows:

On January 8, 1935, the Treasurer of the United States issued Treasury check No. 9,505,866 payable to the order of plaintiff in the amount of $207.90, and signed by G. F. Allen, Chief Disbursing Officer of the defendant. Plaintiff has not received this check nor a duplicate thereof and he has not received the $207.90 represented by the check. Subsequent to January 8, 1935, plaintiff has often requested the Comptroller General to issue a duplicate check.

On or about March 16, 1935, W. A. Wunsch, a cotton program agent in the employ of defendant, forged plaintiff's name as the endorser of the check for $207.90 and, on the same day, delivered the check to Glenn O'Bannon, who, also on the same date, negotiated and cashed the check at the First National Bank at Artesia, New Mexico.

Defendant has filed a motion to dismiss the petition on the ground that the facts alleged in the petition show that the cause of action is barred by the statute of limitation of six years.

From the facts alleged in the petition and admitted for the purpose of the motion to dismiss, it appears that plaintiff's claims and cause of action in this court could not have accrued later than March 16, 1935, and under the provisions of section 156 of the Judicial Code, section 262, U. S. Code, Title 28, became barred six years thereafter, or on March 16, 1941. It is not necessary to decide whether the claim accrued on or before January 8, 1935. Inasmuch as suit was not instituted by the filing of a petition in this court until October 29, 1943, we are without jurisdiction to hear and determine the claim. *United States* v. *Wardell*, 172 U. S. 48; *Hendricks* v. *United States*, 81 C. Cls. 609. The petition must therefore be dismissed for want of jurisdiction. It is so ordered.

Syllabus

MODERN INDUSTRIAL BANK v. THE UNITED STATES

[No. 45602. Decided June 5, 1944]

On the Proofs

Government contract; termination of contract because of contractor's failure to perform; rights of assignee.—Where the contractor was in default on September 1, 1941, as to completion of 6 of the 8 buildings for the Government called for by the contract in suit, and was in default on September 30 and October 6 as to the 2 other buildings; and where the contractor's progress with the work was unsatisfactory from early in August until the contractor's right to proceed was terminated on October 14, 1941; it is *held* that the termination of the contract was specifically authorized by and was proper under Article 9 of the contract, and plaintiff, assignee of the contractor, is not entitled to recover. *Quinn* v. *United States*, 99 U. S. 30; *United States* v. *American Surety Co.*, 322 U. S. 96.

Same.—On the facts as set forth in the findings, and under the provisions of the contract and the assignment; it is *held* that plaintiff, assignee, is entitled to recover only $3,808.67, representing the difference between $7,132.02, the unexpended balance of the total contract price, including the amount of $19,-622.98, on completion of the contract; and $3,233.35, the actual damages sustained by the defendant on account of delay caused by the contractor between September 1 and December 22, 1941, the date on which the work was completed under a separate contract. *P. W. & B. R. R. Co.* v. *Howard*, 13 How. 307; *Phillips & Colby Construction Co.* v. *Seymour et al.*, 91 U. S. 646.

Same; under the Assignment of Claims Act rights of assignee no greater than rights of assignor.—Under the Assignment of Claims Act of 1940, (54 Stat. 1029) plaintiff by its assignment from the contractor could acquire no greater rights in respect of payments or claims arising under the assigned contract than its assignor, the contractor, had; and it may not, therefore, recover any more than the contractor could have recovered in the absence of the assignment.

Same; approval of partial payments by contracting officer; breach of contract; measure of damages.—Where, under the provisions of the contract, it was required that partial payments must be approved by the contracting officer; and where, on account of the contractor's failure of performance, the contracting officer's refusal on October 7 to approve a partial payment for work to that date, was not a breach of the contract; it is *held* that

neither the contractor nor the assignee is entitled to recover on account of the work performed more than the unpaid contract price less the cost of completing the work plus the damages sustained by the defendant. *John M. Whelan & Sons, Inc.*, v. *United States*, 98 C. Cls. 601. *Cf. The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198.

Same; waiver of liquidated damages by termination of contract.—By terminating the contractor's right to proceed the Government waived its right to collect liquidated damages, *United States* v. *American Surety Co.*, 322 U. S. 96, but it did not waive or lose its right to claim and recover actual damages due to the contractor's default. *American Surety Co.* v. *United States*, 136 Fed. (2d) 437.

Same; difficulty of ascertaining exact damages.—Where damages have been sustained the party responsible therefor may not complain as to the difficulty of the exact ascertainment or measurement of the damages. *Eastman Kodak Company of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359.

The Reporter's statement of the case:

Mr. Louis Rosenberg for plaintiff. *Rosenberg & Rosenberg* on brief.

Mr. David L. Kreeger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant. *Mr. Irvin M. Gottlieb* on brief.

Plaintiff sues to recover $18,090.99 alleged to have been due and payable under the contract for work performed and materials furnished by its assignor, the contractor, prior to the date on which the contractor's right to proceed with the work was terminated by the Government.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff at all times hereinafter mentioned was a financial institution engaged in business in the State of New York with its place of business in New York City.

2. June 30, 1941, John Post & Son Corp., a New York corporation, hereinafter sometimes referred to as the "contractor," entered into a contract with defendant wherein the contractor agreed for the consideration of $73,022 to furnish the materials and perform the work for the construction and completion of the following buildings (including utilities thereto) at Fort Hancock, New Jersey.

1 Infirmary,
1 Regimental Chapel,
1 Radio Shelter,
1 Post Finance Building,
4 Administration Buildings.

The work was to be commenced within ten days after receipt of notice to proceed and was to be completed within ninety days thereafter in the case of the Regimental Chapel and within sixty days thereafter in the cases of the other buildings. The notice to proceed was received by the contractor July 2, 1941. The completion dates were accordingly fixed as September 30, 1941, on the Regimental Chapel and August 31, 1941, on the other buildings. The completion date of the Post Finance Building was however later extended to October 6, 1941, on account of the suspension of operations on this building for a time at defendant's order. No notice was ever given by defendant to the contractor of any other change in the completion dates of the several buildings.

Three change orders (dated August 7, September 30, and October 2, 1941) were issued by defendant and accepted by the contractor making certain modifications in the work and calling for a net increase in the contract price of $1,367.03, thus making the total consideration $74,389.03, but no changes in completion dates were provided by these change orders.

3. At the time of execution of the contract, the contractor entered into and delivered to defendant the usual form of payment and performance bonds, each in the principal sum of $36,511.

4. August 5, 1941, the contractor assigned to plaintiff all of its right, title, and interest to "all monies due or to become due from the United States of America, or from any Agency or Department thereof" under the contract. At the time of execution of that assignment, appropriate notices accompanied by the assignment were sent to the contracting officer, the surety on the payment and performance bonds, the General Accounting Office, and the disbursing officer of the defendant designated in the contract to make payment, and were duly received by these parties on the following day. Upon the security of that assignment, plaintiff made advances to the contractor from time to time in the total amount

of $38,500, the first advance being made on August 8, 1941, and the last advance of $4,000 on October 8, 1941.

5. After the contractor entered upon performance of the work under the contract, itemized weekly progress estimates were prepared by defendant's employees commencing with the week ending August 5, 1941, and continuing through week ending October 7, 1941. Each of these estimates was accompanied by a summary of these detailed estimates which showed the following estimated rate of progress by the contractor from week to week and the estimated value in place of the work done as follows:

Date	Value in place	Percent complete	Date	Value in place	Percent complete
Aug. 5 1941	$773.00	1.05	Sept. 9, 1941	16,314.20	22.1
Aug. 12, 1941	3,177.30	4.35	Sept 16, 1941	23,746.25	32.19
Aug. 19 1941	6,136.00	8.31	Sept. 23, 1941	32,707.59	43.7
Aug. 26, 1941	8,596.96	11.6	Sept. 30. 1941	39,970.13	53.5
Sept. 2, 1941	11,756.72	15.93	Oct. 7, 1941	45,549.33	60.985

After each weekly progress estimate was prepared by defendant's representatives it was submitted to the contractor's representative who approved it. It was then signed by defendant's chief engineer who was in charge of the supervision of this contract and a copy delivered to the contractor's representative.

Under the practice followed by defendant the weekly progress estimates were not of themselves a basis for payment, but payments were made on the basis of partial payment estimates which were prepared from time to time. These later estimates were likewise prepared by defendant's employees and submitted to the contractor's representative for approval. After approval by the contractor's representative they were submitted to the chief engineer and the contracting officer for similar action, and, when formally approved, were forwarded by the contracting officer to defendant's fiscal officer at Brooklyn, N. Y., for the preparation of an appropriate voucher and payment. While the value of work in place and the percentage of completion shown in the weekly progress estimates for a given date might be the same as the total amount earned and percentage of completion respectively shown in the partial payment estimate

for the same date, such a situation did not necessarily exist and the later estimates only were used as a basis for payment.

6. August 26, 1941, the first partial payment estimate was prepared by defendant's representative and submitted to the contractor's representative who approved it on the same day. It showed the total amount earned from July 15 to August 26, 1941, as $8,596.96 and that the work was 11.6 percent complete, the amount earned being the same as the amount shown for the value in place as set out on the weekly progress estimate for the week ended August 26, 1941, and the percentage of completion being the same. After approval by the chief engineer and the contracting officer on August 27, 1941, a voucher was prepared on August 30, 1941, showing the project to be 11.65 percent complete as of August 26, 1941, and the first partial payment to be $8,593.04 of which 10 percent was retained. The balance of $7,733.74 was paid to plaintiff September 13, 1941.

7. September 16, 1941, defendant's representative prepared partial payment estimate No. 2 for the period August 26 to September 16, 1941, which showed the amount earned during that period as $15,149.29, the total amount earned under the contract to that date $23,746.25, and the percentage of completion as 32.19. That estimate was submitted to the contractor's representative who approved it on the same day. The total amount earned to that date was the same as shown in the weekly progress report for that date as the total value in place, and the percentage of completion was likewise the same in both reports. The estimate was approved for payment by the chief engineer and the contracting officer September 17, 1941. September 22, 1941, a voucher was prepared showing the project to be 32.19 percent complete as of September 16, 1941, and the amount of the contract price allocable on account of the work done to that date as $23,743.34. From that sum the following items were deducted: (a) $2,374.33 as the percentage of 10 percent to be retained pursuant to the contract; (b) $7,733.74, the first partial payment referred to in the preceding finding; and (c) $960 as liquidated damages on account of delay in the completion of six of the buildings on which the completion

date was August 31, 1941. The balance of $12,675.27 was paid to plaintiff October 3, 1941, making total payments to that date to plaintiff, as contractor's assignee, in the amount of $20,409.01.

8. During August 1941 dissatisfaction developed on the part of defendant's representatives with the progress which was being made by the contractor and at a conference on August 18, 1941, the contractor's representative was requested to take certain steps to expedite the work. August 27, 1941, the contracting officer wrote the contractor that progress under the contract was still very unsatisfactory because an inadequate number of men were employed and because there was not proper supervision. At the same time the contracting officer called the attention of the contractor to its failure to supply a progress schedule for the completion of the work.

September 11, 1941, the contractor replied to the contracting officer's complaints of August 27, 1941, stating that it had "nearly tripled the amount of men engaged in working on the project" and that an additional superintendent had been employed. The new superintendent was found unsatisfactory to defendant and the progress of the work likewise continued unsatisfactory. September 16, 1941, the contracting officer confirmed by letter verbal instructions of September 13, 1941, directing the contractor to increase the number of shifts and the amount of construction plant.

9. October 8, 1941, the contracting officer again wrote the contractor in regard to the unsatisfactory progress of the work and asked that he be furnished a completion date for the work. October 10, 1941, the contracting officer sent the contractor a telegram in which it was stated that the progress of the work was entirely unsatisfactory and asked the contractor to advise him not later than 10 a. m. the following day what action it proposed to take. The record does not contain proof of a reply either to the letter of October 8 or the telegram of October 10, 1941. In addition to the written communications heretofore referred to, several conferences had been had by the contracting officer, or his representatives, with representatives of the contractor in

which the unsatisfactory progress of the work had been discussed and the contractor urged to expedite the work.

October 14, 1941, the defendant declared the contractor in default and terminated its right to proceed with the work, the letter giving the contractor notice to that effect reading in part as follows:

> In spite of numerous weekly requests to you in writing and at conferences with Colonel Anderson and Captain Weaver since the latter part of July 1941, to expedite completion, the work is not yet completed in accordance with plans and specifications.
>
> You have refused and failed to prosecute the work with such diligence as would insure its completion within the time specified in Article 1 of the contract. You have continually refused to increase the number of workers on the job and on October 9, 1941, all your employees were withdrawn from the job.
>
> In view of the above conditions and your failure to complete the work in accordance with the terms of the contract, you are hereby declared in default, and in accordance with Article 9 of the contract your right to proceed with the work is hereby terminated. In further compliance with the provisions of Article 9 of the contract, you are advised that the Government will hold you and your Surety liable for any excess cost occasioned by the Government thereby, and such other charges, including liquidated damages, as may be proper.

When the contractor received the foregoing notice on the morning of October 14, 1941, its employees were at the site of the project but defendant's representative would not permit them to proceed with the work.

10. Shortly prior to termination of the contractor's right to proceed with the work, namely, October 7, 1941, partial payment estimate No. 3 was prepared by defendant's representatives on the job covering the period from September 17 to October 7, 1941, which showed the work as 60.6 percent complete, the amount earned during that period $21,802.98, and the total amount earned to that date $45,549.23. The weekly progress estimates which were likewise dated October 7, 1941, showed the value in place to that date of $45,549.33 and the percentage of completion as 60.985. The contractor's representative signed both the partial payment estimate and the weekly progress estimates and delivered them

to defendant's representatives on the day of receipt, October 7, 1941. Defendant's chief engineer, however, refused to approve the partial payment estimate because the progress of the contractor was not satisfactory to him and it was not for the same reason approved or signed by the contracting officer. However, defendant's chief of engineers signed the weekly progress estimates. On October 11 or 12, 1941, special partial payment estimate No. 3 was prepared by defendant covering the period from September 17 to October 11, 1941, which showed the same percentage of completion as partial payment estimate No. 3 and the total amount earned to that date $45,549.73 instead of $45,549.23, the latter difference being due to an error in addition. However, special partial payment estimate No. 3 was never signed nor approved by representatives of the defendant or the contractor nor was it delivered to the contractor, and no payments were made to the contractor or to plaintiff under that estimate nor otherwise except as shown in findings 6 and 7, that is, total payments of $20,409.01.

11. On the same day the contractor was declared in default, defendant requested the contractor's surety on the performance bond to advise whether it desired to complete the unfinished work in accordance with the contract provisions as it was imperative that all work on these defense facilities be completed at the earliest possible moment. Likewise on the same day, October 14, 1941, the surety company advised defendant that it would not undertake the completion of the contract.

November 12, 1941, defendant entered into a contract with Hansen-Jensen, Inc. for completion of the work called for under the contractor's contract for the total sum of $46,848. The work was completed by Hansen-Jensen, Inc. December 22, 1941, and the amount called for by the contract, $46,848, was paid to this contractor for the work.

The value to defendant of the contractor's (John Post & Son, Inc.) part performance, for which payment was not made for work done between September 17 and October 11, is $7,132.02, representing the difference between the original contract price and the total payments made by defendant under the contract, computed as follows:

Original contract price		$74,389.03
First partial payment to assignee of contractor	$7,733.74	
Second partial payment to assignee of contractor	12,675.27	
Payment to completion contractor	46,848.00	
Total paid for completed work	67,257.01	67,257.01
Balance		7,132.02

12. As shown in finding 2, the completion date under the contractor's contract on six of the buildings was August 31, 1941, and on the other two buildings September 30, and October 6, 1941. The contract was finally completed by Hansen-Jensen, Inc., under a separate contract December 22, 1941. As a basis for the presentation of facts relating to defendant's theory that it is entitled to recover as excess costs or actual damages for delay whatever costs were incurred by the defendant as field office overhead for inspection, guarding, supervision, and administration of the completion of the project from the date when the contractor was first in default on six of the eight buildings on September 1, 1941, to the date the project was finished on December 22, 1941, certain facts were stipulated by the parties relating to these costs. These costs consisted of compensation paid to personnel for services rendered in connection with the project, and fall into two classes: (a) inspectors and watchmen who rendered services exclusively upon this project for a certain time during this period, and (b) an administrative staff and commissioned personnel stationed at Fort Hancock, New Jersey, and engaged during this period in the administration and supervision of six construction projects, including the one in controversy in this suit. The total amount involved in the six contracts was $542,409.86, and the amount involved in the one in controversy represented 13.7 percent of the total amount. The additional costs referred to above are proper costs to the defendant on this project and the proper basis in the circumstances of this case for allocating costs which applied to the six contracts is the relationship which the total contract costs of the six contracts bear to the contract cost of the contract involved

in this suit. These costs, mentioned in (a) and (b) above, are separated into two periods, and are as follows:

September 1, 1941, to October 14, 1941

Compensation paid four inspectors for the time engaged exclusively in inspection of contractor's work		$395.29
Compensation paid administrative staff at Fort Hancock for time engaged solely in administering the six contracts	$3,778.81	
Compensation paid the commissioned personnel for time engaged in the supervision of the performance of the six contracts	778.43	
Compensation paid the four inspectors for the time they were engaged in administrative duties in connection with the six contracts	364.87	
Total	4,922.11	
Amount allocable to contract of plaintiff's assignor based upon the percentage determination of 13.7% referred to above	674.33	674.33
Total		$1,069.62
Amount to be deducted from above on account of expenses allocable to the two buildings, due for completion September 30 and October 6, respectively		200.51
Total excess costs		$869.11

October 14, 1941, through December 22, 1941

Compensation paid watchmen for guarding the equipment and materials of plaintiff's assignor located at the site of the project from the termination of the assignor's contract until completion of the new contract		$391.00
Compensation paid three inspectors for time engaged exclusively in making inspections of project under new contract until completion		402.85
Compensation paid administrative staff at Fort Hancock for time engaged solely in administering the six contracts	$10,183.24	
Compensation paid commissioned personnel for time engaged in the supervision of the performance of the six contracts	1,279.50	
Total	$11,462.74	
Amount allocable to contract of plaintiff's assignor based on the percentage determination referred to above	1,570.39	1,570.39
Total		$2,364.24

13. The total of the above field office overhead expenses is $3,233.35. No evidence has been submitted by plaintiff to indicate that these expenses in the amounts shown were not reasonably or necessarily required in connection with the contract during the total period of delay of 82 calendar days from August 31 to December 22.

14. Article 9 of the contract provided for liquidated damages of $10 a building for each calendar day of delay in completion of the buildings if the Government did not terminate the contractor's right to proceed because of such default and delay. The delay to October 14, 1941, computed under this provision was 286 days and the amount of liquidated damage at ten dollars a day totals $2,860.

The court decided that the plaintiff was entitled to recover $3,898.67.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff, as assignee of John Post & Son Corporation, brought this suit to recover $18,090.99 for work done by its assignor under a construction contract with defendant prior to the date on which the Government terminated the contractor's right to further proceed with the work under art. 9 of the contract.

Plaintiff's first contention is that the action of the Government in terminating the contractor's right to proceed on October 14, 1941, was not justified and, therefore, constitutes a breach of the contract. We cannot agree. The contractor was in default on September 1, 1941 (all dates hereinafter mentioned are 1941), as to completion of six of the eight buildings called for by the contract, and was in default on September 30 and October 6 as to the two other buildings. None of the buildings had been completed on October 14. The contractor's progress with the work was unsatisfactory to the contracting officer from early in August until the contractor's right to proceed was terminated in October. In the circumstances the contracting officer might have terminated the contract earlier under article 9 for unsatisfactory progress (finding 8 and 9). This action on October 14 was specifically authorized by and was proper under article 9. *Quinn* v. *United States*, 99 U. S. 30, 32, 33. *United States* v. *American Surety Co.*, 322 U. S. 96 (April 29, 1944).

Plaintiff next contends that as the contractor's assignee it is entitled to recover from the Government in liquidation of its claim the sum of $18,090.99 out of the sum of $21,802.98 (finding 10) earned by the contractor (plaintiff's assignor) for materials furnished and work done for the period September 17 to October 7, inclusive. Plaintiff claims that this amount of $21,802.98 less 10 percent to be retained, or $19,-622.68 was due and payable under article 16 of the contract and the assignment pursuant to partial payment estimate No. 3 which it claims was approved by the contracting officer on October 7, and further claims that the Government was not entitled to retain this amount of $19,622.68 and apply it on the cost of completing the contract after October 14, or to apply it on actual damages sustained by reason of failure of the contractor to complete the work on time. Plaintiff insists that as between it and the surety on the contractor's performance bond the Government was required, so far as this earned amount of $19,622.68 was concerned, to look to the surety for any excess costs of completion and damages. In view of the facts it is unnecessary to discuss the respective rights of an assignor and a surety.

On the facts in this case as set forth in the findings and under the provisions of the contract and the assignment, we are of opinion that plaintiff is entitled to recover only $3,-898.67, representing the difference between $7,132.02, the unexpended balance of the total contract price, including the amount of $19,622.68, on completion of the contract (finding 11) and $3,233.35, the actual damages sustained by defendant on account of delay caused by the contractor between September 1 and December 22 (finding 12). *P. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 342, 343; *Phillips & Colby Construction Co.* v. *Seymour et al.*, 91 U. S. 646, 651.

The Assignment of Claims Act of 1940, approved October 9, 1940 (54 Stat. 1029), removed the bar of Rev. Stat. sections 3477 and 3737 against assignment of claims and authorized assignments to a financing institution, including any federal lending agency, of "moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more." The act contained the proviso "That unless other-

wise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, * * *. Notwithstanding any law to the contrary governing the validity of assignments, any assignment * * * shall constitute a valid assignment for all purposes." The act further provided that any contract of the War or Navy Departments might provide that payments to an assignee of any claim arising under such contract "shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract." Article 24 of the contract of John Post & Son Corporation permitted assignment by the contractor under this act of 1940.

On August 5, 1941, the contractor assigned to plaintiff all its "right, title, and interest in and to all monies due or to become due from the United States" under the contract of June 30, 1941. Upon the security of this assignment plaintiff advanced to the contractor from time to time a total of $38,500, the first advancement being made on August 8 and the last, in the amount of $4,000, on October 8, 1941. Plaintiff received two partial payments in the amounts of $7,733.74 and $12,675.27, totaling $20,409.01, approved by the contracting officer and paid by the Army Finance Officer at Brooklyn as provided in the contract.

By the assignment of August 5 plaintiff acquired no greater rights in respect of payments or claims arising under the contract than its assignor, the contractor, had. and it may not, therefore, recover any more than the contractor could have recovered in the absence of the assignment. The Assignment of Claims Act of 1940, by providing that payments to an assignee under the contract could not be reduced by any indebtedness of the assignor to the Government "arising independently of such contract," recognized that defenses available to the Government under the contract against the contractor would be equally available against the assignee. Plaintiff's right, as assignee, to demand and receive partial payments for work performed by the contractor was subject to the rights of the Government

under the contract and were subject also to the performance by the contractor of its contractual obligations. Article 16 of the contract did not unconditionally require monthly partial payments for the value of work performed during the preceding month. This article was subject to the other provisions of the contract. It required that partial payments must be approved by the contracting officer, and unless his refusal on October 7 to approve a partial payment for work to that date amounted to a breach of the contract neither the contractor nor the assignee had a right to complain. *Brooklyn & Queens Screen Manufacturing Co., a Corp.*, v. *United States*, 97 C. Cls. 532. His refusal was not such a breach. On October 7 the contractor was in default as to all work under the contract. It had been in default for 37 days in respect of six of the eight buildings. Its progress was then and had been for some time unsatisfactory to the Government, and the proof shows that it was for these reasons the construction engineer and the contracting officer refused on October 7 to approve for payment a partial payment estimate for material delivered and work performed for the period September 17 to October 7 (see findings 9 and 10). As a result of this situation and the inability of the contracting officer to obtain from the contractor assurance as to when it would complete the work, the contractor's right to proceed was terminated and no further payments were approved or made to it. In these circumstances it is clear that the defaulting contractor could not rightly have insisted upon payment on October 7 for work performed to that date, and it could not now recover on account of the work performed more than the unpaid contract price less the cost of completing the work plus the damages sustained by the defendant. Plaintiff, as assignee, is in no better position.

The unexpended balance of the contract price, including retained percentage, after the work had been completed was $7,132.02. This represented the value to defendant of the work done by the contractor and not paid for up to the date its right to proceed was terminated. From this amount defendant is entitled to deduct the actual damages sustained by it by reason of delay due to the contractor's default in

failing to complete the work within the time required by the contract. *John M. Whelan & Sons, Inc.*, v. *United States*, 98 C. Cls. 601. *Cf. The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198, 205–207. The actual damage sustained is satisfactorily shown by the evidence to be $3,233.35 (finding 12). The contractor's failure to complete the work on time was a breach of the contract. The contract, article 9, provided for liquidated damages in lieu of actual damages thereafter and until completion, if the Government did not terminate the contractor's right to proceed before it completed the work. The Government did terminate the right to proceed and in this connection the contract provided that the Government might complete the work, by contract or otherwise, "and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby." By terminating the contractor's right to proceed the Government waived its right to collect the liquidated damages, *United States* v. *American Surety Co.*, 322 U. S. 96 (April 24, 1944), but it did not waive or lose its right to claim and recover actual damages due to the contractor's default. *American Surety Co.* v. *United States*, 136 F. (2) 437, 439. The parties have stipulated the facts with reference to the excess costs or expenses of defendant, as computed in finding 12, resulting from the delay due to failure of the contractor to complete its work on time, but plaintiff objects to the allowances of all these items of defendant's field office overhead expense on the ground that defendant has not submitted sufficient evidence to show that these expenses were "reasonably or necessarily required" in connection with the contract. The method or formula employed in the stipulation and used in finding 12 for determining the amount of defendant's expenses due to delay is the best and most reasonable method, if not the only method, available in this case. The method of allocation is consistent with the rule that where damages have been sustained the party responsible therefor may not complain as to the difficulty of their exact ascertainment or measurement. *Eastman Kodak Company of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359. Plaintiff has suggested no better method of computation than

that which we have employed. The expenses allowed were actually incurred, and plaintiff has submitted no proof in support of its objection that they were not reasonably or necessarily required. *United States* v. *Behan*, 110 U. S. 338, 345, 346.

The difference between the amount of $7,132.02, value of the work performed by the contractor prior to termination, and $3,233.35, damages sustained by defendant, is $3,898.67, and judgment will be entered in favor of plaintiff for this amount. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ALBERT M. HOWARD v. THE UNITED STATES

[No. 45708. Decided June 5, 1944]

On the Proofs

Personal injury damages under special jurisdictional act.—Under the Special Jurisdictional Act (56 Stat. 1184) it is *held* that in the collision between the automobile driven by plaintiff and a mail truck, in which plaintiff was injured, the driver of the mail truck, an employee of the Government, was guilty of negligence and the plaintiff is entitled to recover.

Same; negligence for driver not to see that which is obvious.—Failure of the driver of a Government mail truck to see that which is obvious constitutes negligence.

Same; right of bailee in possession of car to recover.—The plaintiff, who was driving a borrowed car, as a bailee in possession of the car, has the right to recover against a third party wrongdoer for damage done to the car in his possession.

Same; liability to owner not decisive.—The liability or nonliability of the bailee to the owner is not decisive. *The Winkfield*, 71 L. J. P. 21; *United Fruit Co.* v. *United States*, 33 Fed. (2d) 664.

The Reporter's statement of the case:

Mr. Robert F. Klepinger for the plaintiff. *Mr. William H. Webb* was on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is the person named in the Act of June 9, 1942 (56 Stat. 1184), which reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment, as if the United States were suable in tort, upon the claim of Albert M. Howard, of Wheaton, Illinois, for personal injuries and property damage sustained by the said Albert M. Howard when a mail truck or vehicle operated by the Post Office Department through its agents, servants, and employees collided with an automobile in which he was riding on February 25, 1939, near the junction of United States Highway Numbered 330 (commonly known at the point of collision as Roosevelt Road) and Fifth Avenue, Maywood, Illinois: *Provided*, That the judgment shall not exceed the sum of $7,500.

2. Roosevelt Road, referred to in the act, extends east and west. The portion here involved has a 40-foot wide concrete surface divided into four 10-foot wide traffic lanes separated by plainly visible lines marked on the concrete surface. The two northern lanes are for the use of west-bound vehicular traffic, and the two southern lanes are for the use of east-bound vehicular traffic. South of the four-lane concrete pavement is an additional 10-foot strip of highway extending along the boundary of the Edward Hines Hospital grounds. Only the northern 7 feet of the highway are within the town of Maywood.

First Avenue of Maywood, Illinois, extending north and south, intersects Roosevelt Road at right angles. There is a traffic signal with red and green "Stop and Go" lights on each of the four corners of this intersection. Westward from this intersection, Second, Third, Fourth, and Fifth Avenues enter Roosevelt Road from the north at right angles but do not extend through Roosevelt Road, the area adjacent to the highway on the south being wholly occupied by the grounds of the Edward Hines Hospital.

The distance from First Avenue to Fifth Avenue is approximately 1,300 feet. Westward on Roosevelt Road from First Avenue and until beyond Fifth Avenue there are no

stop signals or other signs warning drivers to decrease speed or to stop, except that on the north side of Roosevelt Road facing west-bound traffic, approximately 800 feet east of Fifth Avenue, there was on February 25, 1939, a sign erected by the Illinois State Highway Commission which read "45 M. P. H.," and at a point approximately 460 feet east of Fifth Avenue, a sign on the north side of Roosevelt Road facing west-bound traffic, which read "Slow—Hospital Entrance." The entrance to the grounds of Edward Hines Hospital, a Veterans' Administration facility, is on the south side of Roosevelt Road opposite the end of Fifth Avenue.

3. At approximately 7:20 p. m., February 25, 1939, plaintiff was driving a Dodge four-door sedan automobile westward on Roosevelt Road. The night was cold, clear, and dark. The headlights of the car driven by plaintiff were lighted. The pavement was dry and clear, except for a few small icy spots. Plaintiff stopped at First Avenue and waited until a traffic light turned from red to green. He then continued westward, picking up speed until he was traveling at the rate of about 40 miles per hour between Third and Fourth Avenues. About 100 feet east of Fifth Avenue, because he was approaching the hospital entrance, he slowed his speed by releasing pressure on the accelerator, but did not apply the brakes.

4. Immediately prior to plaintiff's approach to Fifth Avenue, George A. Prack, employed by the United States as a substitute mail carrier, was driving a Government-owned truck southward on Fifth Avenue toward Roosevelt Road, for the purpose of picking up mail in the course of his employment. Without looking with sufficient attention to observe plaintiff's car, which at that time was approaching from his left at a distance from him of between 50 and 100 feet, he drove into Roosevelt Road, making a right turn. He did not see plaintiff's car until after the collision. In making the right turn, the truck first entered the northernmost or outer traffic lane and in continuing its turn swung farther south into the next lane—that is, the inner west-bound traffic lane—in front of plaintiff's car.

Plaintiff saw the truck when he was between 30 and 40 feet east of Fifth Avenue and when the truck was on Fifth Avenue

between 10 and 20 feet north of Roosevelt Road. Plaintiff, on seeing the truck enter the outer traffic lane, believed the driver of the truck intended to continue westward in the outer lane and did not at that moment slacken his speed other than to continue the decrease brought about by his releasing the accelerator upon approach to the hospital entrance.

When the truck commenced to swing into the inner lane from the outer lane, it was about 18 to 20 feet ahead of plaintiff's car. Plaintiff attempted to pull to the left but was not able to turn more than a foot or two when his car struck the left rear end of the truck. After the collision plaintiff's car moved forward and in a slightly southwesterly direction about 10 feet before stopping. It came to rest facing west about 20 degrees south, entirely within the inner west-bound lane except that the left front wheel was about a foot across the center line of the highway. The driver of the truck, upon feeling the impact, applied his brakes, but immediately lost control of the truck, which described a U-turn to the right, running into the grounds of a gas station on the north, overturning, and coming to rest on its left side, facing east, at a point approximately 25 feet north of, and almost opposite, the point of collision.

5. Upon entering Roosevelt Road from Fifth Avenue, the driver of the truck was negligent in failing to look with adequate attention to observe the approach of plaintiff's car and in failing to give plaintiff the right-of-way. Such negligence was the proximate cause of the collision. The plaintiff did not, by his negligence or other fault, contribute to the collision.

6. As a result of the collision plaintiff received a fractured patella of the right leg and a fractured radius of the left arm, which caused great pain and suffering, confined him to the hospital and his home, and kept him from attending to his law practice entirely for approximately seven weeks and in substantial part for about four months thereafter. His loss in earnings because of such disability amounted to $2,000. A substantial and sometimes painful weakness and stiffness of his right leg persist and will probably be permanent.

7. As a result of the collision plaintiff was subjected to the following expenses because of injuries:

Hospital care	$412.30
Nurses' fees	32.50
Fees of physicians and surgeons	325.00
Charge for use of ambulance	15.00
Fees for massages	30.00

Plaintiff paid to his client, Western Ready Roofing Company, the owner of the car he was driving at the time of the collision, the sum of $196.69, the cost of repairing the car. In consideration of the payment, plaintiff received from the owner an assignment of its claim for the amount of damage to the car. Plaintiff made this payment voluntarily and because he thought it was good policy on his part in view of the relationship of attorney and client.

Plaintiff also incurred obligations to pay two of his attending physicians the sum of $25.00 each for testifying as expert witnesses.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a lawyer with his office in Chicago, was driving to his home in Wheaton, Illinois, on the night of February 25, 1939. He was driving an automobile which he had borrowed from a client. His route was along a four-lane highway known as Roosevelt Road, which at one place ran between the City of Maywood, Illinois, and the Edward Hines Memorial Hospital, a veterans' hospital which, with its grounds, occupied a square mile of land south of and abutting on the highway. For one driving west the last street intersecting the highway before the place of the collision was First Avenue, where there was a traffic light. The plaintiff was stopped there by a red light. He proceeded when the light turned green, and passed Second, Third and Fourth Avenues, Maywood streets, which entered the highway from the north but did not cross it because of the hospital grounds which lay south of the highway. The plaintiff had picked up a speed of some forty miles an hour in the quarter of a mile between the traffic light and Fifth Avenue. On the south side of the highway, opposite the entrance of Fifth Avenue from the north side, was an entrance to the hospital grounds, and a gatekeeper's house was located there. A sign along the highway somewhere

near the Third Avenue entrance said "Slow—Hospital Entrance." The plaintiff did not use his brake as he passed the sign, but did take his foot off the accelerator. As he approached Fifth Avenue, a Government mail truck which had approached from the north, turned from Fifth Avenue west, that is, to the right, onto the highway. The plaintiff saw the truck and supposed that it would turn into and proceed along the north or outside lane of the two lanes for west-bound traffic. Instead it proceeded into the inner lane, at least in part. The plaintiff attempted to turn to the left to pass it but did not succeed; his car collided with the truck about twenty feet west of the west curb line, extended, of Fifth Avenue; it struck the truck on the left side of its rear end; the plaintiff was injured and his car damaged in the collision. The mail truck went forward out of control, made a U-turn to the right, and tipped over. The driver of the truck was not injured, and the truck was only slightly damaged.

The driver of the mail truck, one George Prack, was collecting mail from boxes. He had picked up mail along Fifth Avenue and was headed for the next box, which was on Sixth Avenue near the highway. He testified that he stopped at a stop sign which other testimony placed about 27 feet north of the highway. Whether he did or not, we are in doubt. For he also testified that he stopped again, or practically stopped, at the north line of the highway just before turning onto it, and that he looked carefully to the west and to the east to see whether any cars were approaching. We doubt whether he looked to the west with much interest, since east-bound traffic, on the south side of the highway, would have been well out of his intended path. We feel sure that he did not look east with any care at all because the plaintiff's car was at the time proceeding toward him and about 100 feet away, and he could hardly have failed to see it if he had looked at all. He testified that he did not see it, and did not know what had struck him until he crawled out of his overturned truck. We have no doubt of the Government driver's negligence, and of its being a cause of the collision and damage.

A more difficult question is whether the plaintiff was guilty of contributory negligence. We have concluded, somewhat doubtfully, that he was not. We think that he was not under a duty to anticipate the kind of driving which the mail driver indulged in; and to reduce his speed along this unintersected stretch of road so that he could stop or turn quickly enough to avoid a collision such as occurred. We think that normal, and therefore non-negligent, driving, in the circumstances, did not require that he anticipate that the mail driver had not seen what was obvious, and would not act accordingly.

The Government's witness Cieslak, the guard at the gate of the hospital, testified that the plaintiff was driving at fifty miles an hour. The Government urges that he was an impartial witness. We see no reason why he should not have been, yet we do not think he was either truthful or accurate in his testimony. He twice stated positively that the plaintiff's car did not have its lights on, and then twice stated that he didn't remember whether it had lights on or not. He said that it was just starting to get dark, though it was after seven on a dark night in February.

We now consider the items of damage which should be included in the plaintiff's recovery. As to the bills for medical and hospital treatment, there is no controversy as to their amount. We do not allow the $50 which the plaintiff claims for medical expert witnesses at the hearing of this case. The Government urges that the plaintiff may not recover for the cost of repairing the borrowed automobile which he was driving, $196.69. We disagree. We disregard the assignment which the plaintiff took from the owner when he paid the owner the costs of the repairs. But we think that the plaintiff, as a bailee in possession of the car, has the right to recover against a third party wrongdoer, here the Government, for damage done to the car in his possession. If we are right in our conclusion that the plaintiff was not negligent, the owner could not have required the plaintiff to pay for the repairs. But the liability or non-liability of the bailee to the owner is not decisive. When the British Government lost mail as a result of the negligent operation of a ship which collided with the ship which was carrying the mails, it re-

covered against the wrongdoing ship, though it was under no accountability to the senders of the lost mail. *The Winkfield* [1902], P. 42, 71 L. J. P. 21. Our Government claims, and is accorded, the same right. See *United Fruit Co.* v. *United States*, 33 F. (2d) 664. We see no reason why the plaintiff should not have the same right.

The Government urges that the plaintiff, though absent from his law office completely for seven weeks, and to a considerable extent for four months more, has not proved any loss of earnings. It is true that, as to one client from which he received a regular salary, the plaintiff persuaded the client to pay him the salary on the ground that the work had been allowed to pile up so that he did it all after his return. But he testified that a comparison of his earnings for the previous and subsequent years with the year in which he was injured showed that he had lost $3,000 in fees. It is never possible to determine with accuracy what a professional man who works for casual fees has lost by being disabled for a period. We award the plaintiff $2,000 on this account.

The question of how much the plaintiff should receive for his pain and suffering, and for permanent injuries, is a jury question. The pain and suffering were great, for a time, and there are occasional recurrences, not very severe. There is a considerable disability of the injured leg. For an active young man to go through life with a weakness of this kind is a substantial handicap. For pain, suffering, and disability we award the plaintiff $3,500.

The plaintiff may recover $6,511.49. It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

WHALEY, *Chief Justice*, concurring in part and dissenting in part:

I do not think that damages to the automobile should be allowed for the reason that the plaintiff took an assignment of this claim from the owner of the car. No suit can be based on an assignment of a claim. United States Code Annotated Title 28, Sec. 265 (Judicial Code, Section 159).

Except for this item, I concur in the majority opinion.

JONES, *Judge*, took no part in the decision of this case.

FIDELITY TRUST COMPANY ET AL. v. THE UNITED STATES

[Decided June 5, 1944]

On the Proofs

Statute of limitation; failure to file timely claim for refund of taxes erroneously paid under the War Revenue Acts of 1898 and 1914.—Report to the Senate in accordance with Senate Resolution No. 185, November 10, 1941 (77th Congress, 1st session), and section 151 of the Judicial Code (U. S. Code, Title 28, Section 257).

Same; no legal basis for recovery.—Where the statutes in effect at the time required the timely filing of claims for refund of taxes; and where plaintiffs failed to file timely claims for refund of taxes paid under the War Revenue Act of 1898 (30 Stat. 448) and under the Emergency Revenue Act of 1914 (38 Stat. 745); there is no legal basis for recovery by plaintiffs.

Same.—Where there is a determined overpayment of taxes by plaintiffs; and where other taxpayers similarly situated, except as to the statute of limitations, have received refunds upon filing timely claims; this does not save the situation for plaintiffs. *United States* v. *Andrews*, 302 U. S. 517.

Same; no equitable basis for recovery.—Where other taxpayers have come within the statute and been granted refunds upon claims timely filed; and where plaintiffs failed to file timely claims under the statutes then in effect; there is no equitable basis for recovery by plaintiffs.

Same; gratuities; discretion of Congress.—Where there is neither legal nor equitable basis for recovery, the claims are for gratuities and whether plaintiffs are to have relief is solely within the wisdom and sound discretion of the Congress.

The Reporter's statement of the case:

Mr. R. B. H. Lyon for the plaintiffs. *Lyon* and *Lyon* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* was on the brief.

In accordance with Senate Resolution No. 185, referring to the Court of Claims Senate Bill No. 1645, 77th Congress, 1st Session, petitions were filed with the court in 72 cases, as follows:

Cong. No. 17767 FIDELITY TRUST COMPANY,
Cong. No. 17768 MARYLAND TRUST COMPANY, SUCCESSORS TO CONTINENTAL TRUST COMPANY,
Cong. No. 17769 BALTIMORE TRUST COMPANY (JOHN D. HOSPELHORN, RECEIVER),
Cong. No. 17770 SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE,
Cong. No. 17771 UNION TRUST COMPANY OF MARYLAND,
Cong. No. 17772 CITIZENS NATIONAL TRUST & SAVINGS BANK, SUCCESSORS TO CITIZENS TRUST & SAVINGS BANK,
Cong. No. 17773 WELLS FARGO BANK AND UNION TRUST COMPANY, SUCCESSORS TO THE UNION TRUST COMPANY,
Cong. No. 17774 INTERNATIONAL TRUST COMPANY,
Cong. No. 17775 PHOENIX STATE BANK AND TRUST COMPANY, SUCCESSORS TO STATE BANK,
Cong. No. 17776 THE STAMFORD TRUST COMPANY,
Cong. No. 17778 CITIZENS BANK AND TRUST COMPANY, (M. A. SMITH, LIQUIDATOR),
Cong. No. 17779 HARRIS TRUST & SAVINGS BANK,
Cong. No. 17780 CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SUCCESSORS TO CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK,
Cong. No. 17781 CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SUCCESSORS TO HIBERNIAN BANKING ASSOCIATION,
Cong. No. 17782 CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, SUCCESSORS TO ILLINOIS TRUST & SAVINGS BANK,
Cong. No. 17783 CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, SUCCESSORS TO ILLINOIS TRUST & SAVINGS BANK,
Cong. No. 17784 PEOPLES TRUST & SAVINGS COMPANY,
Cong. No. 17785 SECURITY TRUST COMPANY,
Cong. No. 17786 FIRST NATIONAL BANK & TRUST COMPANY, SUCCESSORS TO THE PHOENIX & THIRD TRUST COMPANY,
Cong. No. 17787 STATE BANK & TRUST COMPANY,
Cong. No. 17789 FRANKLIN COUNTY TRUST COMPANY,
Cong. No. 17790 SECURITY TRUST COMPANY,
Cong. No. 17791 BERKSHIRE TRUST COMPANY, FORMERLY BERKSHIRE LOAN & TRUST COMPANY,
Cong. No. 17792 SPRINGFIELD SAFE DEPOSIT & TRUST COMPANY,
Cong. No. 17793 DETROIT TRUST COMPANY, SUCCESSORS TO SECURITY TRUST COMPANY,

Reporter's Statement of the Case

Cong. No. 17794 UNION GUARDIAN TRUST COMPANY, FORMERLY KNOWN AS UNION TRUST COMPANY, BY E. B. FINLEY, JR., M. E. BOWLUS, AND E. A. EDWARDS, LIQUIDATING TRUSTEES,

Cong. No. 17795 MERCANTILE-COMMERCE BANK AND TRUST COMPANY, FORMERLY MERCANTILE TRUST COMPANY,

Cong. No. 17796 MERCANTILE-COMMERCE BANK AND TRUST COMPANY, FORMERLY MERCANTILE TRUST COMPANY,

Cong. No. 17797 MISSISSIPPI VALLEY TRUST COMPANY,

Cong. No. 17799 HUDSON TRUST COMPANY,

Cong. No. 17800 THE PATERSON SAVINGS INSTITUTION,

Cong. No. 17802 MORRISTOWN TRUST COMPANY,

Cong. No. 17803 THE CUMBERLAND NATIONAL BANK OF BRIDGETON, SUCCESSORS TO CUMBERLAND TRUST COMPANY,

Cong. No. 17804 BROOKLYN TRUST COMPANY,

Cong. No. 17805 KINGS COUNTY TRUST COMPANY,

Cong. No. 17806 THE NATIONAL CITY BANK OF NEW YORK, SUCCESSORS TO THE PEOPLES TRUST COMPANY (BROOKLYN, N. Y.),

Cong. No. 17807 MARINE TRUST COMPANY OF BUFFALO, SUCCESSORS TO BUFFALO TRUST COMPANY,

Cong. No. 17808 MARINE TRUST COMPANY OF BUFFALO, SUCCESSORS TO BANKERS TRUST COMPANY,

Cong. No. 17809 CHEMICAL BANK & TRUST COMPANY, SUCCESSORS TO UNITED STATES MORTGAGE & TRUST COMPANY,

Cong. No. 17810 TITLE GUARANTEE & TRUST COMPANY (OF NEW YORK CITY, NEW YORK), SUCCESSORS TO MANUFACTURERS TRUST COMPANY (OF BROOKLYN, NEW YORK),

Cong. No. 17811 BANK OF NEW YORK, SUCCESSORS TO BANK OF NEW YORK AND TRUST COMPANY, SUCCESSORS TO NEW YORK LIFE INSURANCE AND TRUST COMPANY,

Cong. No. 17812 BANK OF NEW YORK, SUCCESSORS TO BANK OF NEW YORK AND TRUST COMPANY, SUCCESSORS TO NEW YORK LIFE INSURANCE AND TRUST COMPANY,

Cong. No. 17813 LAWYERS TRUST COMPANY, SUCCESSORS TO CENTRAL REALTY BOND AND TRUST COMPANY,

Cong. No. 17814 UNITED STATES TRUST COMPANY,

Cong. No. 17816 FIRST TRUST & DEPOSIT COMPANY, SUCCESSORS TO TRUST & DEPOSIT COMPANY OF ONONDAGA,

Cong. No. 17817 FIRST TRUST AND DEPOSIT COMPANY, SUCCESSORS TO CITY BANK TRUST COMPANY,
Cong. No. 17818 FIRST TRUST AND DEPOSIT COMPANY, SUCCESSORS TO CENTRAL CITY TRUST COMPANY,
Cong. No. 17819 THE CITY SAVINGS BANK & TRUST COMPANY,
Cong. No. 17820 FIFTH THIRD UNION TRUST COMPANY, SUCCESSORS TO UNION SAVINGS BANK & TRUST COMPANY,
Cong. No. 17821 CENTRAL NATIONAL BANK OF CLEVELAND. SUCCESSORS TO THE UNITED BANKING & SAVINGS COMPANY,
Cong. No. 17822 CENTRAL NATIONAL BANK OF CLEVELAND, SUCCESSORS TO THE UNITED BANKING & SAVINGS COMPANY,
Cong. No. 17823 THE UNION TRUST COMPANY, SUCCESSORS TO BROADWAY SAVINGS & TRUST COMPANY (RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF OHIO, LIQUIDATOR),
Cong. No. 17824 THE UNION TRUST COMPANY, SUCCESSORS TO STATE BANKING & TRUST COMPANY (RODNEY P. LIEN, SUPERINTENDENT OF BANKS OF OHIO, LIQUIDATOR),
Cong. No. 17825 THE TOLEDO TRUST COMPANY, FORMERLY TOLEDO SAVINGS BANK & TRUST COMPANY,
Cong. No. 17826 THE EASTON TRUST COMPANY,
Cong. No. 17827 CENTRAL TRUST COMPANY,
Cong. No. 17828 HARRISBURG TRUST COMPANY,
Cong. No. 17829 FIDELITY-PHILADELPHIA TRUST COMPANY, SUCCESSORS TO LOGAN TRUST COMPANY,
Cong. No. 17830 GERMANTOWN TRUST COMPANY,
Cong. No. 17831 GIRARD TRUST COMPANY,
Cong. No. 17832 LIBERTY TITLE & TRUST COMPANY, SUCCESSORS TO GERMAN AMERICAN TITLE & TRUST COMPANY,
Cong. No. 17833 LIBERTY TITLE & TRUST COMPANY, SUCCESSORS TO GERMAN AMERICAN TITLE & TRUST COMPANY,
Cong. No. 17834 UNITED SECURITY TRUST COMPANY, FORMERLY UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY (JOHN C. BELL, JR., SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, RECEIVER),
Cong. No. 17835 UNITED SECURITY TRUST COMPANY, FORMERLY UNITED SECURITY LIFE INSURANCE AND TRUST COMPANY (JOHN C. BELL, JR., SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, RECEIVER),

Cong. No. 17836 INTEGRITY TRUST COMPANY, SUCCESSORS TO THE WEST PHILADELPHIA TITLE & TRUST COMPANY,

Cong. No. 17837 FIDELITY TRUST COMPANY, FORMERLY FIDELITY TITLE & TRUST COMPANY,

Cong. No. 17838 MINERS NATIONAL BANK OF WILKES-BARRE, SUCCESSORS TO WYOMING VALLEY TRUST COMPANY,

Cong. No. 17839 FIRST NATIONAL BANK OF SUNBURY, SUCCESSORS TO SUNBURY TRUST & SAFE DEPOSIT COMPANY,

Cong. No. 17840 WAKEFIELD TRUST COMPANY,

Cong. No. 17841 ZION'S SAVINGS BANK & TRUST COMPANY,

Cong. No. 17843 THE LYNCHBURG TRUST & SAVINGS BANK,

Cong. No. 17844 SEATTLE-FIRST NATIONAL BANK (SEATTLE, WASHINGTON), SUCCESSORS TO THE SPOKANE & EASTERN TRUST COMPANY (SPOKANE, WASHINGTON),

v.

THE UNITED STATES

The court made special findings of fact as follows:

1. S. 1645 (77th Congress, 1st Session) is entitled "A bill for the relief of the Fidelity Trust Company, of Baltimore, Maryland, and others." After its second reading it was referred to the Committee on Claims, and by resolution S. RES. 185, November 10, 1941 (77th Congress, 1st Session), was referred to the Court of Claims.

2. S. 1645 provides:

> That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated to * * *. [There follows a list of 78 trust companies in various sections of the United States with sums of money set out. These trust companies with the exception of 6 which are referred to in finding 3 are the plaintiffs involved in these proceedings.]

The final paragraph of the bill reads:

> Said sums represent a refund of the bankers' special tax illegally collected in view of the decisions of the Supreme Court of the United States in the case of Fidelity and Deposit Company of Maryland against United States (259 U. S. 296) and the United States against Fidelity and Deposit Company of Maryland

(266 U. S. 587), and in accordance with the agreement made March 3, 1925, between the Attorney General and the Secretary of the Treasury as a basis for the settlement of such claims, or such greater or less sum as may be found to be due under said decisions and agreement, with interest provided by law.

S. RES. 185 reads as follows:

Resolved, That the bill (S. 1645) entitled "A bill for the relief of the Fidelity Trust Company of Baltimore, Maryland, and others", now pending in the Senate, together with all the accompanying papers, be, and the same is hereby referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911; and the said court shall proceed with the same in accordance with the provisions of such Act and report to the Senate in accordance therewith.

3. Upon the filing of S. RES. 185, with attached bill S. 1645, on November 10, 1941, the 78 listed claims in the bill were given docket numbers Cong. 17767 to Cong. 17844, inclusive, and so docketed. Within the six months prescribed under Rule 18 (a) of the Court of Claims, petitions bearing such docket numbers were filed in 72 cases. No petitions were filed in the following cases:

Cong. No. 17777. Atlantic National Bank of Jacksonville, Successors to the American Trust Co., Jacksonville, Florida,

Cong. No. 17788. Shelby County Trust and Banking Company, Incorporated, Shelbyville, Kentucky,

Cong. No. 17798. Citizens Trust Company, Paterson, New Jersey,

Cong. No. 17801. Mechanics Trust Company, Bayonne, New Jersey,

Cong. No. 17815. Glen Falls National Bank and Trust Company, Successors to Glen Falls Trust Company, Glen Falls, New York,

Cong. No. 17842. Citizens Savings Bank and Trust Company, Saint Johnsbury, Vermont.

Without opposition, a motion filed by the defendant on June 24, 1942, was granted whereby the above six claims were stricken from the docket of the court and accordingly these six cases are eliminated from consideration in this report.

4. The assessment and collection of the Special Bankers Tax at the rate of $2.00 per thousand of the capital and surplus was provided under the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, which reads in part as follows:

SPECIAL TAXES

SEC. 2. That from and after July first, eighteen hundred and ninety-eight, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

ONE. Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars shall pay fifty dollars; when using or employing a capital exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and in estimating capital surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act: *Provided*, That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax.

* * * * *

This taxing act was repealed by the Act of April 12, 1902, c. 500, 32 Stat. 96, to take effect July 1, 1902.

5. The assessment and collection of the Special Bankers Tax at the rate of $1.00 per thousand of the capital, surplus and undivided profits was provided under the Emergency Revenue Act of October 22, 1914, c. 331, 38 Stat. 745, 750, which reads in part as follows:

SPECIAL TAXES

SEC. 3. That on and after November first, nineteen hundred and fourteen, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

First. Bankers shall pay $1 for each $1,000 of capital used or employed, and in estimating capital surplus and undivided profits shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus, and undivided profits for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act: *Provided*, That any postal savings bank, or savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax.

* * * * *

These provisions were amended by joint resolution extending the provisions of the aforesaid act to December 31, 1916, which extension Act was approved December 17, 1915, c. 4, 39 Stat. 2, the material part of which reads as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act entitled "An Act to increase the internal revenue, and for other purposes," approved October twenty-second, nineteen hundred and fourteen (Statutes at Large, volume thirty-eight, pages seven hundred and forty-five to seven hundred and sixty-four, inclusive), are continued in full force and effect until and including December thirty-first, nineteen hundred and sixteen.

* * * * *

By the Act of September 8, 1916, c. 463, 39 Stat. 756, 792, Section 3 of the Emergency Revenue Act of October 22, 1914, and also the aforesaid amending Act of December 17, 1915, were repealed to take effect January 1, 1917.

6. An Act extending the time for the repayment of certain war-revenue taxes erroneously collected was passed by Congress and became a law and was known as the Act of July 27, 1912, c. 256, 37 Stat. 240, which reads as follows:

> * * * That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.
>
> SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid.

7. Following the enactment of the above refunding Act of July 27, 1912, a large number of claims for refund were filed for taxes assessed and collected from various trust companies under the War Revenue Act of 1898. These claims were rejected by the Commissioner of Internal Revenue and suits were instituted.

After extended litigation one of these cases reached the Supreme Court which in its decision announced certain principles under which recovery could be had. *Fidelity and Deposit Company of Maryland* v. *United States*, 259 U. S. 296. As a result of that decision, efforts were made by the various parties concerned to agree upon some basis for the disposition of 187 cases which were then pending in this court and which involved a question decided by the Supreme Court in the case just referred to.

January 31, 1925, the Attorney General wrote a letter to the Secretary of the Treasury in which, after reviewing the history of the litigation, he proposed a basis of settlement, his letter reading in part as follows:

> Insofar as claimants are able to prove that part of their capital, surplus, and undivided profits are not used or employed in the banking business, they are entitled under the ruling of the Supreme Court to a refund of part of the tax originally collected from them.

The legal principles involved in these cases have been enunciated by the courts; what remains is the application of these principles to states of facts with which the Bureau of Internal Revenue is entirely familiar. With an agreement between the parties as to a proper allocation of banking and nonbanking items, such a determination of the facts in each case can be made more easily and expeditiously by the administrative branch of the Government than by the court.

Accordingly there have recently been held several conferences at which there were present counsel for claimants and representatives from the Bureau of Internal Revenue and several members of this Department. As a result of these conferences there has been evolved a plan to dispose of the entire group of cases in a manner that appealed to all parties to the conferences as being fair and equitable. This plan is based upon the decisions in adjudicated cases.

It should be noted that if testimony were to be taken in each case several years would elapse before these cases would be disposed of. This would necessitate the taking of depositions in various sections of the country with the consequent expenditure of much time and money. Then too, the United States would have to pay interest on the judgments eventually rendered at the rate of 6 percent per annum from the date of payment of the tax to the date of rendition of judgment. In the interest of economy, as well as justice, these cases should be disposed of as expeditiously as possible.

The liability of the Government to refund part of the taxes originally collected is undisputed. To ascertain the amount of such taxes which must be refunded, the plan herewith submitted is deserving of your serious consideration. This plan has my approval, and I commend it to you.

Briefly stated, this plan calls for the allocation of all of the assets of a company to three groups, namely, nonbanking, banking, and those assets of a mixed nature, being used partly for banking and partly for nonbanking purposes. The ratio between banking assets and the total assets of the company furnishes a measure of the portion of the capital and surplus of the company which is to be considered as used or employed in the banking business. This latter sum represents the amount of capital and surplus upon which the special tax was properly levied.

8. March 3, 1925, the Secretary of the Treasury approved the recommendation of the Attorney General referred to in the preceding finding, his letter reading in part as follows:

> The Government has litigated from many angles the right to recover in these and other cases in the District Courts of the United States, with the final result that the Supreme Court has adopted the rule that the capital and surplus of a trust company, actually used and employed in the business of banking, is only taxable, and not the entire capital and surplus of the trust company. The application of this rule results that "The question whether the capital was used in the banking business, and if so to what extent, is a question of fact" (*Fidelity & Deposit Company of Maryland* v. *United States*, 259 U. S. 296, 303). The apportionment of the total capital and surplus to the part thereof used and employed in the business of banking, therefore, is an accounting proposition.
>
> Counsel for the claimants and the law officers of the Department of Justice and of the Internal Revenue Bureau have agreed upon a plan, based upon adjudicated cases, which calls for an allocation of all assets of the individual trust company to three groups, viz: nonbanking, banking, and those of a mixed nature, used partly for banking and partly for nonbanking purposes. This allocation will require the auditors in the Tax Unit to examine the reports and proofs in the individual cases necessitating the reauditing of the claims filed and claims allowed on the basis of the allocation sheet.
>
> In the interest of avoiding further litigation and of economy, which will result to the Government, I approve of your recommendation as set forth in your letter. The cases will be reaudited on the basis of the allocation sheet and you will be advised of the amount of tax due in each case so that proper judgments may be entered in the Court of Claims.

9. As a result of the adoption of the procedure suggested by the Attorney General, and agreed to by the Secretary of the Treasury, all of the pending suits for taxes collected under the War Revenue Act of 1898 were audited on the basis of the plan of allocation above referred to, and the resulting amounts of overpaid taxes were refunded to the various plaintiffs with interest.

Other claims for refund of similar Special Bankers tax collected under the Emergency Revenue Act of October 22, 1914, which were filed within the limitations period, were also allowed and disposed of under the same plan of allocation following the decision in the case of *Fidelity and Deposit Company of Maryland* v. *United States*, *supra.*

10. Since the disposition of the above-mentioned claims there have remained approximately 78 claims for refund of Special Bankers tax assessed and collected under the Revenue Acts of June 13, 1898, and October 22, 1914. These claims were rejected by the Bureau of Internal Revenue on the ground that refundment was barred because the claims were not filed within the time prescribed by law. In connection with the consideration of these claims by the Bureau of Internal Revenue, some evidence was presented to the Bureau purporting to show that claims were duly forwarded to the appropriate collectors of internal revenue in some instances and therefore should be considered as having been timely filed, but the Bureau could not find a record of the claims and held that the evidence offered by plaintiffs was insufficient to show that the claims had been filed. These claims are the 78 listed in S. 1645, as to six of which, as heretofore stated, no petitions have been filed.

On the representation that proper claims were timely filed by these taxpayers, as well as on the ground of equity, numerous efforts have been made in behalf of the various trust company taxpayers, or their successors, in practically every session of succeeding Congresses, for remedial legislation. The various bills introduced and the resulting action thereon are listed as follows:

S. 5448—70th Cong., 2nd Session.
S. 892—71st Cong., 1st Session.
H. R. 7396—71st Cong., 2nd Session.
S. 2145—72nd Cong., 1st Session.
S. 2611—72nd Cong., 1st Session.
S. 1461—73rd Cong., 1st Session; favorable report thereon No. 397.
S. 1461—73rd Cong., 2nd Session; favorable report thereon, No. 1493.
H. R. 5119—74th Cong., 1st Session.

S. 694—74th Cong., 1st Session; favorable report thereon No. 159; passed the Senate February 25, 1935. Favorably reported in House of Representatives, 74th Cong., 1st Session, No. 563; passed House of Representatives in July 1935.

The passage of such bills was uniformly opposed by the Secretary of the Treasury as appears from various congressional committee reports and in a letter of April 8, 1934, from the Secretary of the Treasury Morgenthau to Honorable Loring M. Black, Jr., Chairman, Committee on Claims, House of Representatives, in relation to S. 1461 (73rd Cong., 2nd Session), which letter reads in part as follows:

MY DEAR MR. CHAIRMAN: Reference is made to Senate Bill 1461 (73rd Cong., 2nd Sess.), which passed the Senate March 15, 1934, and has been referred to your Committee for consideration, extending the time for the filing of claims for the refund of bankers special taxes erroneously collected under the Acts of June 13, 1898, and October 22, 1914.

The bill authorizes and directs the Commissioner of Internal Revenue to receive, consider, and adjudicate, in the light of the decisions of the United States Supreme Court in the cases of *Fidelity and Deposit Company* v. *U. S.*, 259 U. S. 296, and *U. S.* v. *Fidelity and Deposit Company*, 266 U. S. 587, and in accordance with the agreement with the Attorney General referred to therein, such claims as may be filed within six months after the passage thereof.

Many claims for refund of taxes of the class specified, filed within the limitation periods fixed by law, were considered and have long since been settled by the Commissioner of Internal Revenue in accordance with the Supreme Court decisions cited. Suits brought in the Court of Claims for the recovery of such taxes have also been settled in accordance with the agreement referred to. The statutory periods within which claims of this character might have been filed have long since expired.

The operation of statutes of limitations ought not to be made dependent upon the outcome of litigated cases. The illegality of the taxes here involved was as apparent to one as to another, and those who, for whatever reason, failed to protect their interests by the filing of a claim for refund within the time prescribed by law would appear to be entitled to no more equitable consideration than any other of the numerous classes of taxpayers

> whose claims for the refund of erroneously collected taxes are uniformly being rejected on no other ground than because they were not filed within the period of limitation prescribed by law. It is deemed necessary from an administrative standpoint to place some reasonable limitation upon the filing of claims for the refund of erroneously collected taxes and it has been the policy of the Department to look with disfavor upon proposed legislation designed to avoid the operation of the bar of statutes of limitations.

The attitude of Congress is shown by the several reports referred to in these findings which are made a part hereof by reference.

11. S. 694, having passed both Houses of Congress, was presented to the President of the United States, who vetoed the bill on June 18, 1935. The language of his veto appears in Senate No. 105, 74th Congress, 1st Session, and reads in part as follows:

> This bill authorizes refunds of the bankers' special taxes which were, under the principles laid down by the United States Supreme Court in *Fidelity & Deposit Co.* v. *United States* (259 U. S. 296), and *United States* v. *Fidelity & Deposit Co.* (266 U. S. 587), erroneously collected many years ago under the acts of June 13, 1898, and October 22, 1914, notwithstanding the fact that the prescribed statutory periods for refund have long since expired.
>
> But recently, there was submitted to me another bill which proposed to except certain taxpayers from the operation of the statutes of limitations pertaining to the revenue laws by extending the time for the refunding of certain taxes to such taxpayers. At that time, I had occasion to express my accord with the enacted policy of Congress that it is sound to include in all revenue acts, statutes of limitations, by the operation of which, after a fixed period of time, it becomes impossible for the Government to collect additional taxes or for the taxpayer to obtain a refund of an overpayment of taxes. I pointed out in that instance that legislation, such as the proposed bill, selects a small class of taxpayers for special treatment by excepting them from that policy. Such legislation thus discriminates against the whole body of Federal taxpayers, and establishes a precedent which would open the door to relief in all cases in which the statute operates to the prejudice of a particular tax-

> payer, while leaving the door closed to the Government in those cases in which the statute operates to the disadvantage of the Government.
>
> * * * * *
>
> With regard to S. 694, * * * I know of no circumstances which would justify the exception made by that bill to the long-continued policy of Congress. Again I must express my belief that the field of special legislation should not be opened to relieve special classes of taxpayers from the consequences of their failure to perfect their claims for the refund of taxes within the period fixed by law.

The efficacy of the President's veto was contested in the case of *Fidelity Trust Co.* v. *United States*, No. 43328, and was sustained, 86 C. Cls. 752, on authority of *Wright* v. *United States*, 84 C. Cls. 630, affirmed by the Supreme Court of the United States, 302 U. S. 583.

12. Thereafter further attempts were made for congressional relief as follows:

S. 3267—74th Cong., 1st Session. This bill was referred by the Senate Committee on Claims to the Attorney General of the United States, for his views on its merits, and in a letter addressed to the Honorable Josiah W. Bailey, dated August 20, 1935, the Attorney General expressed himself as follows:

> As the considerations of policy which the President expressed in his message vetoing Senate Bill 694 are equally applicable in the present bill (S. 3267), I do not favor its enactment.

S. 3359—75th Cong., 3rd Session.

S. 4104—76th Cong., 3rd Session.

H. R. 6819—76th Cong., 3rd Session; favorable report No. 2237.

S. 927—77th Cong., 1st Session.

S. 1645—77th Cong., 1st Session.

S. RES. 185—77th Cong., 1st Session.

The above S. 1645 and S. RES. 185 are now before the Court.

13. The various plaintiffs paid taxes under the War Revenue Act of June 30, 1898, and the Emergency Revenue Act of October 22, 1914, as follows:

Cong. No.	Plaintiff	Tax paid	Date
17767	Fidelity Trust Co. of Balto., Md.	$1,418.67	12-30-14
		1,093.00	9-24-15
		1,093.00	3-17-16
		1,132.50	9-1-16
	Total	4,737.17	
17768	Maryland Trust Co., Successors to Continental Trust Co.	2,296.00	2-1-15
		1,432.50	11-9-15
		14.33	11-9-15
		1,432.50	1-21-16
		1,435.50	9-5-16
	Total	6,610.83	
17769	Baltimore Trust Co. (John D. Hospelhorn, Receiver)	2,440.67	2-26-15
		122.03	2-27-15
		24.40	2-27-15
		1,668.50	7-29-15
		1,668.50	1-21-16
		1,571.00	9-5-16
	Total	7,495.10	
17770	Safe Deposit & Trust Co. of Baltimore	682.00	8-10-98
		616.00	6-30-99
		634.00	7-17-1900
		508.00	7-27-1901
	Total	2,440.00	
17771	Union Trust Co. of Maryland	330.00	1-20-15
		436.67	1-28-15
		330.00	2-3-16
		376.00	8-30-16
	Total	1,472.67	
17772	Citizens National Trust & Savings Bank, Successors to Citizens Trust & Savings Bank.	426.00	11-25-14
		321.00	7-9-15
		325.50	1-13-16
		331.00	7-10-16
	Total	1,403.50	
17773	Wells Fargo Bank and Union Trust Co., Successors to Union Trust Co.	1,595.00	7-18-16
17774	International Trust Co.	$680.00	11-23-14
		.67	12-9-14
		510.50	7-8-15
		510.50	1-10-16
		520.50	7-26-16
	Total	2,222.17	
17775	Phoenix State Bank and Trust Co., Successors to State Bank.	1,051.42	-1898
		932.00	-1899
		800.00	-1900
		800.00	-1901
	Total	3,583.42	
17776	The Stamford Trust Co.	377.00	11-25-14
		269.00	9-10-15
		249.00	2-17-16
		251.50	8-29-16
	Total	1,146.50	
17778	Citizens Bank and Trust Co. (M. A. Smith, Liquidator)	381.50	6-30-15
		381.50	6-30-16
	Total	763.00	

Reporter's Statement of the Case

Cong. No.	Plaintiff	Tax paid	Date
17779	Harris Trust & Savings Bank	$2,678.67 2,241.00 2,241.00 2,388.50	1-28-15 10-1-15 3-21-16 9-7-16
	Total	9,549.17	
17780	Continental National Bank & Trust Co. of Chicago, Successors to Continental & Commercial Trust & Savings Bank.	3,284.00 2,471.50 2,471.50 2,472.00	2-1-15 10-4-15 3-29-16 9-15-16
	Total	10,699.00	
17781	Continental Illinois Nat. Bank and Trust Co. of Chicago, Successors to Hibernian Banking Assn.	1,730.00 1,730.00 1,744.00	10-4-15 3-21-16 9-7-16
	Total	5,204.00	
17782	Continental Illinois Nat. Bank & Trust Co. of Chicago, Successors to Illinois Trust & Savings Bank.	9,188.00 8,000.00 10,000.00 12,000.00 1,130.00	9-8-98 7-24-99 7-28-1900 7-25-01 8-30-02
	Total	40,318.00	
17783	Continental Illinois Nat. Bank & Trust Co. of Chicago, Successors to Illinois Trust & Savings Bank.	10,509.90 7,975.50 7,975.50 8,200.00	11-27-14 9-30-15 1-31-16 9-15-16
	Total	34,660.90	
17784	Peoples Trust & Savings Co., Fort Wayne, Indiana	176.67	12-10-14
17785	Security Trust Co., Indianapolis	258.67	12-24-14
17786	First Nat. Bank & Trust Co., Successors to Phoenix & Third Trust Co.	137.33	11-28-14
17787	State Bank & Trust Co., Richmond, Kentucky	93.00 93.00 95.00	7-12-15 1-13-16 7-19-16
	Total	281.00	
17789	Franklin County Trust Co., Greenfield, Massachusetts	$204.67 102.33 157.00 157.00 161.00	12-5-14 10-29-15 7-29-15 1-18-16 7-15-16
	Total	782.00	
17790	Security Trust Co., Lynn, Mass.	251.72 253.00	1-24-16 9-18-16
	Total	504.72	
17791	Berkshire Trust Co., Formerly Berkshire Loan & Trust Co.	166.49 131.00 131.00 140.50	11-28-14 7-15-15 1-13-16 7-24-16
	Total	568.99	
17792	Springfield Safe Deposit & Trust Co.	854.67	1-22-15
17793	Detroit Trust Co., Successors to Security Trust Co.	1,477.00 1,477.00 1,501.50	7-27-15 1-24-16 7-18-16
	Total	4,455.50	
17794	Union Guardian Trust Co., Formerly known as Union Trust Co., By E. B. Finley, Jr., et al., Liquidating Trustees	830.00	8-1-16

Reporter's Statement of the Case

Cong. No.	Plaintiff	Tax paid	Date
17795	Mercantile-Commerce Bank & Trust Co., Formerly Mercantile Trust Co.	$3,162.51	7- -1900
		3,552.00	7- -1901
	Total	6,714.51	
17796	Mercantile-Commerce Bank & Trust Co., Formerly Mercantile Trust Co.	6,534.67	1-13-15
		4,938.00	10-1-15
		4,938.00	3-24-16
		4,948.50	8-23-16
	Total	21,359.17	
17797	Mississippi Valley Trust Co., of St. Louis	5,726.67	1-12-15
		4,183.00	10-1-15
		4,183.00	3-27-16
		4,147.00	8-25-16
	Total	18,239.67	
17799	Hudson Trust Co., Union City, New Jersey	1,436.58	11-25-14
		665.00	8-13-15
		665.00	3-15-16
		658.50	9-1-16
	Total	3,425.08	
17800	Paterson Savings Institution, Paterson, New Jersey	836.00	10-3-98
		800.00	8-12-99
		800.00	1-29-1900
		816.00	8-2-01
		250.00	8-26-02
	Total	3,502.00	
17802	Morristown Trust Co	1,140.45	11-30-14
		804.50	8-17-15
		804.50	9-7-16
		797.50	9-7-16
	Total	3,546.95	
17803	Cumberland Nat. Bank of Bridgeton, Successors to Cumberland Trust Co.	$165.96	11-30-14
		125.00	9-14-15
		127.50	3-3-16
		135.50	9-9-16
	Total	553.96	
17804	Brooklyn Trust Co	2,612.50	9-11-16
17805	Kings County Trust Co	1,924.00	2-5-15
		1,493.50	8-27-15
		1,493.50	2-23-16
		1,564.50	9-6-16
	Total	6,475.50	
17806	National City Bank of New York, Successors to The Peoples Trust Co., Brooklyn, N. Y.	1,281.50	9-8-16
17807	Marine Trust Co. of Buffalo, Successors to Buffalo Trust Co.	167.34	1-5-15
		158.50	9-1-15
		159.00	3-10-16
	Total	484.84	
17808	Marine Trust Co. of Buffalo, Successors to Bankers Trust Co.	785.34	1-23-15
		575.00	8-26-15
		575.00	3-15-16
		636.00	8-26-16
	Total	2,571.34	

Cong. No.	Plaintiff	Tax paid	Date
17809	Chemical Bank & Trust Co., Successors to United States Mortgage & Trust Co.	$3,131.00	9-3-15
		3,149.00	9-18-16
		3,131.00	10-21-16
	Total	9,411.00	
17810	Title Guarantee & Trust Co. (of New York City) Successors to Manufacturers Trust Co. (of Brooklyn, N. Y.).	2,076.00	7-19-98
		2,000.00	6-28-99
		2,000.00	6-29-1900
		50.00	10-6-1900
		50.00	10-6-1900
		52.50	12-1-1900
		2,000.00	6-29-01
		50.00	7-10-01
		730.00	8-29-02
	Total	9,008.50	
17811	Bank of New York, Successors to Bank of New York & Trust Co., Successors to New York Life Insurance & Trust Co.	8,816.52	7-29-98
		6,056.00	7-14-99
		227.00	12-8-99
		6,384.00	7-24-1900
		6,478.00	7-24-01
		67.00	1-24-02
	Total	28,028.52	
17812	Bank of New York, Successors to Bank of New York and Trust Co., Successors to New York Life Insurance & Trust Co.	3,774.00	10-20-16
		2,751.50	10-20-16
		2,751.50	10-20-16
		1,375.75	5-27-18
	Total	10,652.75	
17813	Lawyers Trust Co., Successors to Central Realty Bond & Trust Co.	2,750.00	7-13-1900
		250.00	8-30-1900
		68.75	9-6-1900
		3,000.00	7-25-01
		1,692.00	9-2-02
	Total	7,760.75	
17814	United States Trust Co of N. Y.	$8,122.50	9-19-16
		8,088.50	10-20-16
	Total	16,211.00	
17816	First Trust & Deposit Co., Successors to Trust & Deposit Co. of Onondaga.	617.34	1-8-15
		737.50	9-24-15
		737.50	3-27-16
		810.00	9-2-16
	Total	2,902.34	
17817	First Trust & Deposit Co., Successors to City Bank Trust Co.	168.00	1-4-15
		130.50	9-18-15
		130.50	3-31-16
		295.50	8-25-16
	Total	724.50	
17818	First Trust & Deposit Co., Successors to Central City Trust Co.	392.00	1-12-15
		297.00	9-16-15
		297.00	4-1-16
		307.00	8-28-16
	Total	1,293.00	
17819	City Savings Bank & Trust Co.	97.32	7-19-15
		92.00	7-19-15
		96.00	1-10-16
		99.00	7-12-16
	Total	384.32	

Cong. No.	Plaintiff	Tax paid	Date
17820	Fifth Third Union Trust Co., Successors to Union Savings Bank & Trust Co.	$3,004.00	11-30-14
		2,254.00	9-17-15
		2,254.00	3-23-16
		2,250.50	9-15-16
	Total	9,762.50	
17821	Central Nat. Bank of Cleveland, Successors to The United Banking & Savings Co.	No proof	
17822	Central Nat. Bank of Cleveland, Successors to The United Banking & Savings Co.	594.62	11-25-14
		456.10	7-14-15
		456.00	1-13-16
		468.50	7-13-16
	Total	1,975.22	
17823	Union Trust Co., Successors to Broadway Savings & Trust Co.	252.49	11-30-14
		272.85	1-12-15
		393.50	7-15-15
		393.50	1-15-16
	Total	1,312.34	
17824	The Union Trust Co., Successors to State Banking & Trust Co.	262.23	11-30-14
		124.44	1-6-15
		231.00	6-11-15
		197.50	7-6-15
		197.50	1-17-16
	Total	1,012.67	
17825	The Toledo Trust Co., formerly Toledo Savings Bank & Trust Co.	374.00	7-15-15
		374.00	1-25-16
		385.00	1-26-16
		183.25	1-23-17
	Total	1,316.25	
17826	The Easton Trust Co	292.00	7-20-15
		292.00	1-27-16
		305.50	7-28-16
	Total	889.50	
17827	Central Trust Co. of Harrisburg	$231.34	12-31-14
		188.00	8-13-15
		188.00	3-7-16
		200.00	8-19-16
	Total	807.34	
17828	Harrisburg Trust Co	554.67	11-1-14
		416.50	8-13-15
		416.50	3-13-16
		431.50	8-19-16
	Total	1,819.17	
17829	Fidelity-Philadelphia Trust Co., Successors to Logan Trust Co.	970.40	12-17-14
		747.72	7-1-15
		746.00	3-15-16
		711.50	9-9-16
	Total	3,175.62	
17830	Germantown Trust Co	1,064.00	4-29-15
17831	Girard Trust Co	8,132.00	4-16-15
		5,721.00	1-29-16
		5,721.00	3-23-16
		5,599.50	9-9-16
	Total	25,173.50	

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Cong. No.	Plaintiff	Tax paid	Date
17832	Liberty Title & Trust Co., Successors to German American Title & Trust Co.	$628.98 474.22 474.00 481.00	11-23-14 7-21-15 1-22-16 7-25-16
	Total	2,058.20	
17833	Liberty Title & Trust Co., Successors to German American Title & Trust Co.	1,102.00 1,000.00 1,000.00 1,000.00	7-29-98 9-7-99 9-10-1900 9-5-01
	Total	4,102.00	
17834	United Security Trust Co., formerly United Security Life Insurance and Trust Co.	No proof of payment and no overpayment claimed.	
17835	United Security Trust Co., formerly United Security Life Insurance & Trust Co.	2,650.00 68.61 2,650.00 2,654.00 2,700.00 82.00	8-6-98 8-11-98 7-25-99 7-26-1900 7-27-01 8-25-02
	Total	10,804.61	
17836	Integrity Trust Co., Successors to The West Philadelphia Title & Trust Co.	702.00 529.00 529.00 531.50	12-9-14 7-27-15 1-26-16 7-26-16
	Total	2,291.50	
17837	Fidelity Trust Co., formerly Fidelity Title & Trust Co.	2,730.94 2,000.00 2,000.00 2,000.00 1,298.00	7-27-98 7-20-99 7-26-1900 7-17-01 1-2-02
	Total	10,028.94	
17838	Miners Nat. Bank of Wilkes-Barre, Successors to Wyoming Valley Trust Co.	686.16 525.00 518.00 518.00	11-28-14 7-27-15 7-29-15 1-24-16
	Total	2,247.16	
17839	First Nat. Bank of Sunbury, Successors to Sunbury Trust & Safe Deposit Co.	$230.99 176.50 176.50 181.50	12-4-14 7-17-15 1-14-16 7-13-16
	Total	765.49	
17840	Wakefield Trust Co.	288.00 75.00 50.00 276.00 50.00 280.00 50.00 280.00	9-2-98 6-27-99 7-25-99 7-25-99 7-5-1900 7-5-1900 7-18-01 7-18-01
	Total	1,349.00	
17841	Zion's Savings Bank & Trust Co.	400.00 400.00 400.00	7-29-99 7-10-1900 7-31-01
	Total	1,200.00	

Cong. No.	Plaintiff	Tax paid	Date
17843	Lynchburg Trust & Savings Bank	$261.71	11-28-14
		261.33	12-7-14
		149.50	9-25-16
	Total	672.54	
17844	Seattle-First Nat. Bank (Seattle, Wash.), Successors to the Spokane & Eastern Trust Co.	200.00	7- -98
		200.00	7- -99
		60.00	7-23-1900
		128.00	11-21-01
		64.00	1-7-02
		8.00	2-12-02
	Total	660.00	

14. Allocations of assets to banking and nonbanking activities, in accordance with the agreement between the Attorney General and the Secretary of Treasury referred to in S. 1645, show that of the taxes paid as set out in the preceding finding the various plaintiffs involved in these proceedings overpaid their taxes as follows:

Cong. No.		
17767.	Fidelity Trust Company of Baltimore, Md	$2,116.86
17768.	Maryland Trust Co., Successors to Continental Trust Co., Baltimore, Md	3,323.30
17769.	Baltimore Trust Corp., Liquidating Agent of Baltimore Trust Co., Baltimore, Md	3,409.34
17770.	Safe Deposit and Trust Co. of Baltimore, Baltimore, Md	66.00
17771.	Union Trust Co. of Maryland, Baltimore, Md	867.67
17772.	Citizens National Trust and Savings Bank of Los Angeles, Successors to Citizens Trust and Savings Company, Los Angeles, California	1,108.92
17773.	Wells Fargo Bank and Union Trust Co., Successors to Union Trust Co. of San Francisco, San Francisco, California	$1,074.90
17774.	International Trust Co., Denver, Colorado	993.50
17775.	Phoenix State Bank and Trust Co., Successors to State Bank, Hartford, Connecticut	397.42
17776.	Stamford Trust Company, Stamford, Connecticut	636.17
17778.	Citizens Bank and Trust Co., Tampa, Florida	323.50
17779.	Harris Trust and Savings Bank, Chicago, Illinois	4,219.80
17780.	Continental Illinois National Bank and Trust Co. of Chicago, Successors to Continental and Commercial Trust and Savings Bank, Chicago, Illinois	5,179.17
17781.	Continental Illinois National Bank and Trust Co. of Chicago, Successors to Hibernian Banking Association, Chicago, Illinois	2,170.00

Cong. No.		
17782.	Continental Illinois National Bank and Trust Co. of Chicago, Successors to Illinois Trust and Savings Bank, Chicago, Illinois	$9,512.00
17783.	Continental Illinois National Bank and Trust Co. of Chicago, Successors to Illinois Trust and Savings Bank, Chicago, Illinois	10,706.23
17784.	Peoples Trust and Savings Company, Fort Wayne, Indiana	155.04
17785.	Security Trust Company, Indianapolis, Indiana	153.34
17786.	First National Bank and Trust Company, Successors to Phoenix and Third Trust Company, Lexington, Kentucky	104.00
17787.	State Bank and Trust Company, Richmond, Kentucky	154.50
17789.	Franklin County Trust Company, Greenfield, Massachusetts	75.99
17790.	Security Trust Company, Lynn, Massachusetts	148.26
17791.	Berkshire Trust Company, formerly Berkshire Loan and Trust Co., Pittsfield, Massachusetts	117.99
17792.	Springfield Safe Deposit and Trust Company, Springfield, Massachusetts	170.67
17793.	Detroit Trust Company, Successors to Security Trust Company, Detroit, Michigan	1,392.50
17794.	Union Guardian Trust Company, Successors to Union Trust Co., Detroit, Michigan	440.50
17795.	Mercantile-Commerce Bank and Trust Company, formerly Mercantile Trust Co., St. Louis, Missouri	197.49
17796.	Mercantile-Commerce Bank and Trust Company, formerly Mercantile Trust Co., St. Louis, Missouri	9,283.50
17797.	Mississippi Valley Trust Company, St. Louis, Missouri	8,223.84
17799.	Hudson Trust Company, Union City, New Jersey	2,036.25
17800.	Paterson Savings Institution, Paterson, New Jersey	2,438.00
17802.	Morristown Trust Company, Morristown, New Jersey	2,737.45
17803.	Cumberland National Bank of Bridgeton, Successors to the Cumberland Trust Co. of Bridgeton, Bridgeton, New Jersey	100.46
17804.	Brooklyn Trust Company, Brooklyn, New York	1,525.00
17805.	Kings County Trust Company, Brooklyn, New York	2,864.57
17806.	National City Bank of New York, Successors to Peoples Trust Co., Brooklyn, New York	570.50
17807.	Marine Trust Company of Buffalo, Successors to Buffalo Trust Co., Buffalo, New York	101.00

Cong. No.		
17808.	Marine Trust Company of Buffalo, Successors to Bankers Trust Co., Buffalo, New York	$878.51
17809.	Chemical Bank and Trust Company, Successors to United States Mortgage and Trust Co., New York City, New York	3,845.50
17810.	Title Guarantee and Trust Company of New York City, New York, Successors to Manufacturers Trust Co., Brooklyn, New York	3,798.00
17811.	Bank of New York, Successors to Bank of New York and Trust Co., Successors to New York Life Insurance and Trust Co., New York City, New York	16,502.52
17812.	Bank of New York, Successors to Bank of New York and Trust Co., Successors to New York Life Insurance and Trust Co., New York City, New York	7,300.00
17813.	Lawyers Trust Company, Successors to Central Realty Bond and Trust Co., New York City, New York	1,078.75
17814.	United States Trust Company of New York, New York City, New York	15,706.50
17816.	First Trust and Deposit Company, Successors to Trust and Deposit Co. of Onondaga, Syracuse, New York	1,555.17
17817.	First Trust and Deposit Company, Successors to City Bank Trust Co., Successors to Central City Trust Co., Syracuse, New York	132.11
17818.	First Trust and Deposit Company, Successors to City Bank Trust Co., Successors to Central City Trust Co., Syracuse, New York	438.67
17819.	City Savings Bank and Trust Company, Alliance, Ohio	226.32
17820.	Fifth Third Union Trust Company, Successors to Union Savings Bank and Trust Co., Cincinnati, Ohio	1,836.33
17821.	Central National Bank, Successors to Central United National Bank, Successors to the United Banking and Trust Co., Cleveland, Ohio	0.00
17822.	Central National Bank, Successors to Central United National Bank, Successors to the United Banking and Trust Co., Cleveland, Ohio	1,297.99
17823.	Union Trust Company, Successors to the Broadway Savings and Trust Co., Cleveland, Ohio	734.01
17824.	Union Trust Company, Successors to the State Banking and Trust Co., Cleveland, Ohio	565.67
17825.	Toledo Trust Company, formerly Toledo Savings Bank and Trust Co., Toledo, Ohio	622.67
17826.	Easton Trust Company, Easton, Pennsylvania	502.67
17827.	Central Trust Company, Harrisburg, Pennsylvania	210.01

Cong. No.		
17828.	Harrisburg Trust Company, Harrisburg, Pennsylvania	$545.50
17829.	Fidelity-Philadelphia Trust Company, Successors to Logan Trust Co., Philadelphia, Pennsylvania	1,706.81
17830.	Germantown Trust Company, Philadelphia, Pennsylvania	459.33
17831.	Girard Trust Company, Philadelphia, Pennsylvania	10,859.33
17832.	Liberty Title and Trust Company, Successors to German American Title and Trust Co., Philadelphia, Pennsylvania	1,147.03
17833.	Liberty Title and Trust Company, Successors to German American Title and Trust Co., Philadelphia, Pennsylvania	1,794.00
17834.	United Security Trust Company, formerly United Security Life Insurance and Trust Co., Philadelphia, Pennsylvania	0.00
17835.	United Security Trust Company, formerly United Security Life Insurance and Trust Co., Philadelphia, Pennsylvania	8,136.61
17836.	Integrity Trust Company, Successors to the West Philadelphia Title and Trust Co., Philadelphia, Pennsylvania	932.33
17837.	Fidelity Trust Company, formerly Fidelity Title and Trust Co., Pittsburgh, Pennsylvania	1,932.94
17838.	Miners National Bank of Wilkes-Barre, Successors to Wyoming Valley Trust Co., Wilkes-Barre, Pennsylvania	805.16
17839.	First National Bank, Successors to Sunbury Trust and Safe Deposit Co., Sunbury, Pennsylvania	416.66
17840.	Wakefield Trust Company, Wakefield, Rhode Island	669.00
17841.	Zion's Saving Bank and Trust Company, Salt Lake City, Utah	712.00
17843.	Lynchburg Trust and Savings Bank, Lynchburg Virginia	162.90
17844.	Spokane and Eastern Trust Company, Spokane, Washington	426.00

It was stipulated between the parties that the various plaintiffs who filed petitions under S. RES. 185 are properly designated in the several petitions, and that these plaintiffs are the same parties, or the successor parties, who are set out in S. 1645 (77th Congress, 1st Session), referred to in this finding, and listed under numbers corresponding with the petition numbers in Finding 13.

As shown in finding 10, the overpayments set out above were not allowed by the Commissioner of Internal Revenue because the parties were unable to show to his satisfaction that timely claims for refund were filed. Satisfactory evidence has not been presented to this court of the timely filing of such claims.

The court concluded that the plaintiffs have no legal nor equitable claim against the United States, and it was ordered that the foregoing special findings of fact, together with the court's conclusion of law, and the following opinion be transmitted to the Senate, in accordance with the provisions of section 257 of Title 28 of the United States Code (section 157, Judicial Code).

WHALEY, *Chief Justice*, delivered the opinion of the court:

By Senate Resolution 185 of November 10, 1941 (77th Congress, 1st Session) there was referred to this court for action in accordance with the Tucker Act, Act of March 3, 1887 (24 Stat. 505), as amended by the Act of March 3, 1911, the claim of certain taxpayers, Senate Bill S. 1645.

The plaintiffs involved in these proceedings filed petitions in this court pursuant to Senate Resolution 185 under docket numbers Congressional 17767 to Congressional 17844, inclusive. Six of the parties named in Senate Bill S. 1645 failed to file petitions.

Under Section 151 of the Judicial Code, the court is authorized to make a report to the Senate of its determination of the facts involved together with its conclusions as to whether the claims are legal or equitable, or are gratuities—merely an advisory report for the assistance or guidance of the Senate in its proper consideration of the merits of bill S. 1645.

Some of the seventy-two plaintiffs involved filed returns under the War Revenue Act of June 13, 1898 (c. 448, 30 Stat. 448), and the others filed returns under the Emergency Revenue Act of October 22, 1914 (c. 331, 38 Stat. 745), and paid the taxes shown due on those returns. Subsequent to the filing of their returns, other taxpayers similarly situated contested the interpretation by the Commissioner of Internal Revenue of these Acts under which they, as well as these plaintiffs, had made payments of these taxes. The contro-

versy was decided in 1922 adversely to the Commissioner. *Fidelity and Deposit Company of Maryland* v. *United States*, 259 U. S. 296.

At that time a large number of cases was pending in the courts and in the Internal Revenue Bureau on claims for refund timely filed. These cases were disposed of by the refunding of the amount of the overpayments shown due pursuant to a computation under a formula agreed upon by the Secretary of the Treasury and the Attorney General. Plaintiffs, however, were not given refunds for the reason that proof of the filing of timely claims for refund was not furnished. That deficiency in proof still exists. The overpayments resulting from the application of the principle of law laid down in the case just referred to are set out in our findings and show overpayments in all of the seventy-two cases except two wherein there are small underpayments. What we have therefore is the situation often met, where demands are made for determined overpayments and such demands are refused because of the bar of the statute of limitations.

When refunds were denied by the Commissioner, these plaintiffs sought relief through various bills introduced in Congress. Four of those bills were reported favorably and one bill passed both Houses of Congress but was vetoed by the President. Spokesmen for the Government have consistently opposed these bills on the general ground that these taxpayers are no more entitled to refund of the determined overpayments than any other taxpayer or class of taxpayers who failed to protect themselves against the running of the statute and that it would be inequitable to remove the bar in isolated cases. In his veto message of bill S. 694 the President said in part—

> * * * Again I must express my belief that the field of special legislation should not be opened to relieve special classes of taxpayers from the consequences of their failure to perfect their claims for the refund of taxes within the period fixed by law.

See Senate No. 105, 74th Congress, 1st Session.

It is clear from what we have said that no legal basis exists under which recovery can be had. The statutes in effect at

the time required the timely filing of claims for refund and those statutes must be complied with. *Tucker* v. *Alexander*, 275 U. S. 228. The fact that there is a determined overpayment and that other taxpayers similarly situated, except as to the bar of the statute of limitations, have received refunds does not save the situation for plaintiffs. *United States* v. *Andrews*, 302 U. S. 517.

Nor do we think that equitable grounds exist merely because some other taxpayers have come within the statute and been granted refunds. The statement in the President's veto message seems to us sound wherein he stated that to allow refunds in these cases "discriminates against the whole body of Federal taxpayers, and establishes a precedent which would open the door to relief in all cases in which the statute operates to the prejudice of a particular taxpayer, while leaving the door closed to the Government in those cases in which the statute operates to the disadvantage of the Government."

The plaintiffs are not entitled to either legal or equitable relief. The claims are for gratuities. Whether plaintiffs are to have relief is solely within the wisdom and sound discretion of the Congress.

It is ordered that the special findings of fact, conclusion of law, and the foregoing opinion of the court be transmitted to the Senate, in accordance with the act of March 3, 1911, 36 Stat. 1087, 1138 (Sec. 151 of the Judicial Code, Sec. 257, Title 28 of the United States Code) amending the Act of March 3, 1887, 24 Stat. 505, 507.

Madden, *Judge*; Whitaker, *Judge*; and Littleton, *Judge*, concur.

Jones, *Judge*, took no part in the decision of this case.

CASES DECIDED

IN

THE COURT OF CLAIMS

February 1, 1944, to June 30, 1944

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43671. Howard C. Myers
No. 43672. John H. Arble
No. 43673. Charles C. Martin
No. 43674. Walter O. Plitz
No. 43675. George H. Spitz

June 5, 1944

Extra pay for overtime; customs employees; meaning of "overtime" under the statute.

Opinion February 1, 1943; defendant's motion for new trial overruled April 5, 1943. See 99 C. Cls. 158.

Reversed by the Supreme Court January 3, 1944. See 320 U. S. 561; 100 C. Cls. 573.

In accordance with the opinion and mandate of the Supreme Court the following order was entered on June 5, 1944:

> These cases come before the court on the mandate of the Supreme Court of the United States; and it appearing that on February 1, 1943, the Court of Claims filed special findings of fact with an opinion holding that the plaintiffs were entitled to recover and entered judgment in favor of each of them; and it further appearing that on January 3, 1944, the Supreme Court reversed the judgment of this court and remanded the cases "for determination of the claim of the inspectors in accordance with the opinion of this Court"; and it further appearing that a stipulation was filed on May 9, 1944, signed on behalf of the plaintiffs by Robert M. Drysdale and on behalf of the defendant by Assistant

Attorney General Francis M. Shea, in paragraph 2 of which it is stated—

"That under the decision of the Supreme Court of the United States it is considered by the defendant that the basis of computing Sunday or holiday pay is an allowance of two days' pay for work not in excess of eight hours, whether continuous or not, performed within the twenty-four hour period of a Sunday or holiday and overtime pay at the rate of one-half day's pay for each two hours or fraction thereof of at least one hour for all work in excess of eight hours during such twenty-four hour Sunday or holiday period. For example, if an employee worked from 12:00 midnight to 1:00 a. m. and from 2:00 p. m. to 10:00 p. m., it is the defendant's claim that they are entitled to two days' Sunday or holiday pay for eight hours' service and one-half day's overtime pay for the additional hour. On this basis the amount due the plaintiff Howard C. Myers is $2,562.91; the plaintiff John H. Arble $2,571.87; the plaintiff Charles C. Martin $2,439.29; the plaintiff Walter O. Plitz $2,804.23; and the plaintiff George H. Spitz $1,504.14";

It further appearing by the plaintiffs' requested findings of fact filed May 12, 1944, that—

"Plaintiffs are withdrawing their claims in these cases for overtime on weekdays, as per paragraph 4 of stipulation filed herein, and also are withdrawing their claims for computation of Sunday and holiday pay and overtime pay on those days, as computed in paragraph 3 of said stipulation, and therefore request findings of fact that plaintiffs, under stipulation of counsel, are entitled to judgments, in accordance with paragraph 2 of said stipulation" in the amounts stated above;

And it further appearing that on May 12, 1944, the commissioner of the court to whom these cases were referred filed his memorandum report recommending that judgment be entered for each of the above-named plaintiffs in the amount stated in paragraph 2 of the stipulation, quoted above—now therefore,

It is ordered this 5th day of June 1944, that, in accordance with the decision and mandate of the Supreme Court the judgments heretofore entered by this court in favor of the plaintiffs herein be and the same are vacated and withdrawn and judgment is now entered in favor of each of them as follows:

Order

43671 Howard C. Myers, two thousand, five hundred sixty-two dollars and ninety-one cents ($2,562.-91),
43672 John H. Arble, two thousand, five hundred seventy-one dollars and eighty-seven cents ($2,571.-87),
43673 Charles C. Martin, two thousand, four hundred thirty-nine dollars and twenty-nine cents ($2,-439.29),
43674 Walter O. Plitz, two thousand, eight hundred four dollars and twenty-three cents ($2,804.23),
43675 George H. Spitz, one thousand, five hundred four dollars and fourteen cents ($1,504.14).

No. 43548. June 5, 1944

Algernon Blair, Individually, and to the use of Roanoke Marble & Granite Company, Inc.

Government contract; increased costs and delay caused by acts of Government agents.

Judgment for the plaintiff, October 5, 1942; defendant's motion for new trial overruled March 1, 1943. Opinion 99 C. Cls. 71.

Reversed by the Supreme Court except as to Item six, April 10, 1944. 321 U. S. 730.

In accordance with the opinion and mandate of the Supreme Court, the following order was entered June 5, 1944:

This case comes before the court on the mandate of the Supreme Court of the United States; and it appearing that on October 5, 1942, the Court of Claims filed special findings of fact with an opinion holding that plaintiff was entitled to recover and judgment was entered therefor; and it further appearing that on April 10, 1944, said Supreme Court reversed the judgment of this court "as to all items except the claim of $9,730.27," and remanded the case for further proceedings in conformity with its opinion that day announced,—now, therefore,

It is ordered this 5th day of June, 1944, that, in accordance with the decision and mandate of the Supreme Court, the judgment heretofore entered by this court in favor of plaintiff be and the same is vacated and withdrawn, and judgment is now entered in the sum of nine thousand seven hundred thirty dollars and twenty-seven cents ($9,730.27) for the item "Dangers representing

increased costs and wages for the use of a subcontractor, Roanoke Marble & Granite Co., Inc.," (Item 6, finding 13).

It is further ordered that the petition as to all other items be and the same is dismissed.

Nos. 45504, 45505, 45925. June 5, 1944

M. H. Pagenhardt and Co., a corporation.

In these cases, involving Government contracts, upon identical stipulations in each case filed by the parties thereto, and upon a report by a commissioner of the court recommending that judgments be entered in accordance with the provisions of said stipulations, and upon plaintiff's motion for judgment, it was ordered June 5, 1944, that judgments be entered as follows:

In No. 45504, judgment for the plaintiff in the sum of $4,605.40;

In No. 45505, judgment for the plaintiff in the sum of $5,222.23;

In No. 45925, judgment for the defendant, on its counterclaim, in the sum of $9,827.63.

No. 45673. June 5, 1944

Breen Renting Corporation.

Rental contracts to furnish equipment, including operating personnel and supplies, for use on W. P. A. projects in New York City.

On plaintiff's offer of compromise, accepted by the Attorney General, and on the report of a commissioner recommending that judgment be entered for the plaintiff in the agreed amount, judgment was entered for the plaintiff in the sum of $34,443.81.

No. 45871. June 5, 1944

Sam Block and Milton Gerald Block, doing business as Oil Well Equipment Co.

Contract to salvage oil well casing and equipment in exchange for title thereto and for title to other equipment, sup-

plies, material and machinery located on property of the defendant within Naval Petroleum Reserve No. 1, Elk Hills Oil and Gas Field, Kern County, California.

Upon a stipulation filed by the parties and upon a report by a commissioner of the court recommending that judgment be entered for the plaintiff for the stipulated amount, judgment was entered for the plaintiff in the sum of $17,933.25.

No. 44294. June 5, 1944

Menominee Tribe of Indians.

Indian claims; compensation for "swamplands" under the treaty of 1854; contractual rights under treaty.

Plaintiff entitled to recover under the jurisdictional act (49 Stat. 1085) as amended (52 Stat. 208), subject to the reduction of offsets, if any, and reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings as provided in Rule 39 (a) of the court.

Decided December 1, 1944; defendant's motion for new trial overruled February 2, 1942. Opinion 95 C. Cls. 232.

In accordance with the above opinion of the court, a stipulation was filed by the parties in which, besides other things, it was stated:

I. The value of the timber removed from swamp lands located within the Menominee Indian Reservation since May 12, 1854 and for which plaintiff has received no compensation aggregates $9,548.10 less $4,667.10 for cutting and banking, or a net amount of $4,881.00. The timber thus removed was removed in 1897–8 and interest at 4% per annum on the net amount of $4,881.00 from 1898 to 1943, inclusive, amounts to $8,785.80. The value of the timber thus removed together with interest due thereon aggregates $13,666.80.

II. Thirty-three thousand, eight hundred seventy and twenty-three hundredths (33, 870.23) acres, more or less, of land located within the 10 townships which together constitute the Menominee Indian Reservation are contained within legal subdivisions, the greater part of each of which was "wet and unfit for cultivation" as of September 28, 1850, and were conveyed to the State of Wisconsin by the Swamp Land Act of September 28, 1850

Order

(9 Stat. 519). No other legal subdivisions of lands, the greater part of each of which was "wet and unfit for cultivation," were located within such 10 townships as of September 28, 1850, or conveyed to the State of Wisconsin by said Act of September 28, 1850.

III. The present acquisition cost to the Menominee Tribe of Indians of said 33,870.23 acres of land, including the timber situated thereon, is $1,767,616.11.

IT IS FURTHER STIPULATED AND AGREED that judgment may be entered by the Court in favor of the Menominee Tribe of Indians for $1,781,282.91, of which $13,666.80 represents the value of the timber removed from the Menominee Indian Reservation since May 12, 1854, including interest thereon, for which plaintiff is entitled to be compensated, and $1,767,616.11 represents the present acquisition cost to the Menominee Tribe of Indians of the swamp lands located within the Menominee Reservation.

Upon the motion of the plaintiff for judgment, which was allowed, and in accordance with the provisions of the stipulation, judgment was entered for the plaintiff in the sum of $1,781,282.91.

JUDGMENTS ENTERED UNDER THE ACT OF JUNE 25, 1938

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197), and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON FEBRUARY 7, 1944

No. 44513. The Vang Construction Company	$22, 573. 96

ON MARCH 6, 1944

No. 44374. Wickham Bridge & Pipe Company	6, 082. 49
No. 44552. American District Steam Company, a Corporation	304. 97

ON APRIL 3, 1944

No. 44453. Martin J. Bein, et al	$186.83
No. 44454	99.35
No. 44455	1,647.18
No. 44456	143.51
No. 44457	198.59
No. 44458	916.71
No. 44459	498.08
No. 44460	458.81
No. 44461	792.35
No. 44462	78.77
No. 44463	209.87
No. 44464	3,034.97
No. 44465	1,122.84
No. 44466	375.69
No. 44467	65.80
No. 44468	84.11
	9,913.26
No. 44514. West Brothers Brick Company	3,092.27
No. 44526. Ceco Steel Products Corporation	141.78
No. 44527	104.34
No. 44528	909.47
No. 44529	51.11
No. 44531	93.30
	$1,300.00

ON MAY 1, 1944

No. 44355. Neuman Bros. Inc., a Corporation	$920.82
No. 44411. Monsell Bracey and Hugh Neal Bracey, co-partners	1,718.74
No. 44471. Puget Sound Bridge and Dredging Company	7,000.00
No. 44567. Atlanta Terra Cotta Company	1,110.86

ON JUNE 5, 1944

No. 44254. Mississippi Valley Structural Steel Company	$3,784.54
No. 44485. Art Metal Construction Company	12,659.67
No. 44532. Stow & Davis Furniture Company	6,178.44
No. 44533. Corbin Brick Company, Inc.	2,825.80

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR BY THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON FEBRUARY 7, 1944

45467. Cuban Telephone Company.
45826. Tennessee Coal, Iron & Railroad Company
46042. Robert S. Barlow.

ON MARCH 6, 1944

45523. Seaboard Trust Company.
45524. South River Trust Company.
45525. South River Trust Company.
45569. Seaboard Trust Company.
45571. Locomotive Finished Materials Co.
45827. Interstate Hosiery Mills, Inc.

ON APRIL 3, 1944

43782. U. S. Industrial Alcohol Company.
45480. Irving Trust Company, Trustee, etc.
45875. Herbert Rivington Pyne, et al., executors.

ON MAY 1, 1944

45670. The Cleveland Trust Co., executor.
45718. Lamar Baker.
45719. Mrs. Lamar Baker.
45720. R. H. Crow.
45721. Mrs. R. H. Crow.
45722. Ruby Love Haynes.
45723. Mrs. A. E. Haynes.
45725. J. L. Haynes.
45726. Mrs. J. L. Haynes.
45727. J. B. Haynes.
45728. Mrs. J. B. Haynes.

ON JUNE 5, 1944

45312. Patrick M. Sweeney, et al.
45510. A. T. Ferrell.
45857. Daniel K. Weiskopf, etc.
45888. Republic National Bank of Dallas.
45917. Citizens National Bank.

ON JUNE 6, 1944

45770. Guaranty Trust Company, as trustee.

Cases Involving Government Contracts

ON FEBRUARY 7, 1944

45806. Safe Parachute Jump Company.

ON APRIL 3, 1944

45499. Armour & Company (an Illinois Corp.)
45500. Armour & Company, of Delaware, etc.

ON MAY 1, 1944

45621. Silas Pembroke Whitney, et al.

ON JUNE 8, 1944

45880. George W. Condon et al.

Cases Involving Pay and Allowances

ON MARCH 6, 1944

45769. Baruch M. Hornblass.

ON APRIL 3, 1944

44095. Thomas L. Allman.

45718. James A. Samouce.

45777. Frederick P. Jenks.

ON MAY 1, 1944

45608. William J. Galvin, Jr.

45683. Cecil C. McMasters.

ON JUNE 5, 1944

45685. William Burton Wiggin.

Case Involving Indian Claim

ON APRIL 5, 1944

C-531(17) The Sioux Tribe of Indians.

Cases Under the NIRA Act of June 25, 1938

ON FEBRUARY 7, 1944

44130. Jacob Halter & Sons Company.

44507. Fidelity & Deposit Company of Maryland.

44508. Fidelity & Deposit Company of Maryland.

ON MARCH 6, 1944

44469. Campbell Metal Window Corporation.

44470. Campbell Metal Window Corporation.

44530. Ceco Steel Products Corporation.

ON APRIL 3, 1944

44483. St. Louis Fire Door Company.

ON MAY 1, 1944

44516. Martin Dyeing & Finishing Co.

44517. Martin Dyeing & Finishing Co.

44539. Bertolini Brothers Co.

ON JUNE 8, 1944

44339. George Locke Tarlton.

REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

CAPE ANN GRANITE CO., INC. v. THE UNITED STATES

[No. 44901]

[100 C. Cls. 53; 321 U. S. 790]

Government contract; extensions of time; unforeseeable causes.

Decided October 4, 1943; petition dismissed. Plaintiff's motion for new trial overruled November 1, 1943. Opinion 100 C. Cls. 53.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 27, 1944.

JOSEPH IRVING McMULLEN v. THE UNITED STATES

[No. 45242]

[100 C. Cls. 323; 321 U. S. 790]

Conviction of Army officer operates as immediate and permanent removal from office, under section 203, Title 18, U. S. Code.

Decided December 6, 1943; petition dismissed. Opinion 100 C. Cls. 323.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 27, 1944.

THE UNITED STATES, PETITIONER, v. ALGERNON BLAIR, INDIVIDUALLY, AND TO THE USE OF ROANOKE MARBLE & GRANITE COMPANY.

[No. 43548]

[99 C. Cls. 71; 321 U. S. 730]

On writ of certiorari (320 U. S. 720) to the Court of Claims to review a judgment for plaintiff in a suit against the United States, by a contractor on a claim for certain expenses alleged to have been imposed on him by the arbitrary, capricious, and unfair actions of the Government's agents and officials.

The decision of the Court of Claims was *reversed in part* and *affirmed in part* by the Supreme Court April 10, 1944.

Mr. Justice Murphy delivered the opinion of the Supreme Court, holding:

1. The Government construction contract here involved imposed no duty on the Government to take affirmative steps to prevent a contractor from unreasonably delaying or interfering with the attempt of another contractor to complete construction in advance of the time specified; and the Government was not liable for damages for such delay.

The fact that after the execution of the contract the contractor gave notice to all other parties of his intention to finish ahead of schedule does not alter the obligation of the Government.

2. An award of damages by the Court of Claims against the Government on items which were the subject of "disputes concerning questions arising under this contract"—though the actions of the Government agents upon which the claims were based be assumed to have been unauthorized, unreasonable and arbitrary—*held* erroneous in view of the failure of the contractor to appeal to the departmental head as required by Article 15 of the contract, it not appearing that the appeal procedure provided was in fact inadequate.

3. The Court of Claims properly allowed a claim of the contractor, to the use of a subcontractor, for extra labor costs incurred by the subcontractor under conditions erroneously imposed by the Government superintendent.

Mr. Justice Frankfurter filed an opinion dissenting in part, in which Mr. Justice Roberts joined.

SOUTHERN RAILWAY COMPANY, PETITIONER, v. THE UNITED STATES

[No. 45227]

[100 C. Cls. 175; 322 U. S. 72]

On writ of certiorari (321 U. S. 758) to review a judgment of the Court of Claims holding that, where plaintiff, a non-land-grant railroad, entered into an agreement with the Government to transport over its lines Government property at the lowest net tariff rates lawfully available over land-aided routes between the same points of origin and destination, under the unambiguous terms of the equalization agreement plaintiff was obligated to equalize to the Government net rates computed in each case via the lawfully available land-grant route from point of origin to point of destination in fact producing the lowest net rate, regardless of whether such land-grant route was in fact commercially competitive and regardless of how circuitous and impractical it might be.

The judgment of the Court of Claims was, on April 24, 1944, *affirmed* by the Supreme Court.

Mr. Justice Douglas delivered the opinion of the Supreme Court, holding:

1. A railroad company which, in order to compete with land-grant roads over which the Government is entitled to ship at reduced rates, has entered into a so-called "freight-land-grant equalization agreement" by which it has agreed to accept for the transportation of property shipped for account of the United States and for which the United States is entitled to reduced rates over land-grant roads, "the lowest net rates lawfully available as derived through deductions account of land-grant from the lawful rates filed with the Interstate Commerce Commission," may claim for such transportation only the amount which the United States would have to pay for shipment over the cheapest land-grant route, even though such route is so circuitous that shipment thereby would have been improvident and uneconomical.

2. In determining whether the United States was entitled to have a circuitous routing used as a basis in computation of freight charges under freight-land-grant equalization agreement between the Government and carrier, the fact that in a given case the shipment prob-

ably would not have moved over the land-grant route was immaterial.

3. In construing a freight-land-grant equalization agreement between a common carrier and the United States, the Court could not resolve ambiguities against the United States, but was required to assume that the contracting officers for the United States drove as provident a bargain as a reading of the agreement fairly permitted.

4. Where the passenger-land-grant equalization agreement gave equalizing carriers more favorable rates than lowest rates to which the Government was lawfully entitled on land-grant routes, the omission of any such qualification in freight-land-grant equalization agreement between carrier and Government could be considered in construing the latter agreement.

NILS P. SEVERIN, AS SURVIVING PARTNER OF NILS P. SEVERIN AND ALFRED N. SEVERIN (NOW DECEASED), FORMERLY CO-PARTNERS TRADING UNDER THE STYLE OF N. P. SEVERIN COMPANY, v. THE UNITED STATES

[No. 43421]

[99 C. Cls. 435; 322 U. S. 733]

Government contract; breach by Government; damages sustained by subcontractor; assignment of claim forbidden by statute; nominal damages not recoverable against Government.

Decided May 3, 1943; plaintiff entitled to recover only for the actual loss incurred by plaintiff and not for loss by subcontractor. Opinion 99 C. Cls. 435.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 1, 1944.

ANASTASIO A. YLAGAN v. THE UNITED STATES

[No. 45948]

[*Ante*, p. 294; 322 U. S. 763]

Statute of limitation; the statute is not tolled by failure of other remedies.

Decided March 6, 1944; petition dismissed on defendant's motion. Opinion, page 294, *ante*.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court June 12, 1944.

INDEX DIGEST

ALIEN, SUIT BY.

I. Under the provisions of Section 155 of the Judicial Code (U. S. Code, Title 28, section 261) which provides that "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction"; it is *held* that the burden of showing that this condition precedent to jurisdiction exists rests upon the alien claimant. *Aktiebolaget Imo-Industri, 483.*

II. Section 155 of the Judicial Code (U. S. Code, Title 28, section 261) assumes that the alien's claim is one which satisfies the jurisdictional specifications of the statute defining the jurisdiction of the Court of Claims as "to subject matter and character." *Id.*

BITUMINOUS COAL ACT OF 1937—Continued.

II. Where, in the invitation to bid on coal to be furnished for the Government, it was stated that if on the date of opening of bids there had been no judicial determination that the minimum price under the Bituminous Coal Act of 1937 was applicable to the Government the lowest bid would be accepted and that if before the date of opening the bids there had been such judicial determination then the code price would be paid instead of the bid price, if the bid price was lower; and where no such judicial determination had been made prior to the date of opening the bids but plaintiff had in letters to the Government's purchasing agent indicated, before delivery of coal under the contract, that it would comply with the requirements of the code, of which plaintiff was a member; it is *held* that under the terms of the invitation to bid and of the contract and the provisions of the statute the Government was obligated to pay the minimum code price for coal delivered under the contract, and plaintiff is accordingly entitled to recover. *Id.*

III. The Government's agents who wrote the invitation for bids, which became a part of the contract, by the language used, manifested an intention to obey the law scrupulously, in the making of the contract if by the time of the making they knew what the law was; the language used gives no indication that they had prejudged the legal issues; and there was no indication that they thought that even if the law were to be held applicable to sales to the Government, yet the Government could, with impunity, buy below the code price on the ground that the code price would be binding only on the seller. *Id.*

IV. The intent of the Government not to participate in, or to induce, a breach of its own laws if the proper interpretation of such laws should be made before the contract was made was shown by the words of the invitation to bid; and the statements made by the Government's agents and the circumstances after the contract was signed, show that their intent as to the meaning of the contract after its execution was not different. *Id.*

CONTRACTS—Continued.

that the court is without jurisdiction to review such decisions. *L. E. Myers Co.*, 41.

II. Under a contract for the construction of a post office building where the Government changed the stone to be used, it is held that the change made was within the general scope of the contract, which was not breached thereby and plaintiff is not entitled to recover. Cf. *General Contracting and Construction Co.* v. *United States*, 84 C. Cls. 570. *Silberblatt & Lasker, Inc.*, 54.

III. What constitutes an equitable adjustment is a question of fact. *United States* v. *Callahan-Walker Construction Co.*, 317 U. S. 56. *Id.*

IV. In the instant case, the dispute as to what was an equitable adjustment on account of a change was a dispute arising under the contract, which the contracting officer was authorized to decide under Article 15 of the contract, and his decision as amended and approved by the head of the department was final and conclusive, where not arbitrary, capricious or grossly erroneous. *Id.*

V. Where the decision, on appeal, by the Under Secretary of the Treasury, as head of the department, was submitted for review to the Administrator of the Federal Works Agency, who concurred in the decision of the Under Secretary; and where the proof shows that the decision of the Under Secretary was rendered without prior conference with the Administrator and was uninfluenced by the views of the Administrator; it is *held* that the decision of the Under Secretary was his own independent judgment and plaintiff under the provisions of the contract is bound thereby. *Id.*

VI. Damages for delay in making a change in contract cannot be recovered unless it is shown that such delay was unreasonable. *Magoba Construction Company* v. *United States*, 99 C. Cls. 662; *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61, cited. *Id.*

VII. Under the provisions of the contract in the instant case, plaintiff is bound by the decision of the head of the department in assessing liquidated damages where there is no showing of any arbitrary, capricious or grossly erroneous action. *Id.*

CONTRACTS—Continued.

which the Government was responsible, including home office overhead. *Id.*

XVIII. Where, in connection with a contract for the construction of a Government building by the plaintiff, the statement on a contract drawing, submitted to bidders, as to the level of the ground water at the site of the proposed building, turned out to be erroneous; it is not shown by the evidence that there was any substantial seasonal variation in the water level; and it is shown that the statement on the drawing was wrong as of the time the excavation was made and as of the dates given on the drawing itself. *Virginia Engineering Co., Inc.*, 516.

XIX. Where, in the standard Government instructions to bidders, which had been sent to the plaintiff, it is stated that "bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other local contingencies"; this language does not require bidders to presume the possible falsity of information, such as that given on the water level drawing in the contract in suit, for the purpose of inducing bids carefully adjusted to the stated conditions. See *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, 10. *Id.*

XX. Where in a Government construction contract it was provided in the specifications that "in case of difference between drawings and specifications, the specifications shall govern;" it is *held* that in the instant case no such difference is found between the drawing and the specifications as to require the drawing to be discarded from the contract. *Id.*

XXI. Where, in connection with a Government construction contract, the Government apparently negligently misstated a material fact and thereby misled the plaintiff, to its damage; and where the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid; the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract, and the court should therefore, in effect, reform the

CONTRACTS—Continued.

contract by putting them in the position they would have occupied but for the mistake. *Id.*

XXII. The court having found that the actions of the contracting officer with reference to the use of certain equipment were, upon the facts and under the terms and conditions of the contract in suit, arbitrary and so grossly erroneous as to imply bad faith (*Saalfield* v. *United States*, 246 U. S. 610; *Chicago and Northwestern Ry. Co.* v. *United States*, 104 U. S. 681; *Ripley* v. *United States*, 223 U. S. 695; *Bein* v. *United States*, 101 C. Cls. 144), the question left for decision was whether the decisions of the contracting officer were intended to be final under the contract or whether plaintiff was required to appeal the contracting officer's decisions to the head of the department or else lose his right to maintain suit for recovery of damages for breach of contract. *James Garfield Needles, et al.*, 535.

XXIII. Where, under the provisions of the rental contract in suit, it was required that adverse decisions of the contracting officer on questions of fact should, except as otherwise provided therein, be appealed by the contractor to the head of the department, whose decisions were final; it is *held* first, that the contract did not require appeals as to the particular decisions made by the contracting officer, but made his decisions final, and, second, that on the evidence adduced in the instant case the decisions which the contracting officer made were not decisions of questions of fact within the meaning of Article 12 of the contract. *Id.*

XXIV. The fact that a claimant may, in addition to alleging a breach of the written contract and praying for general relief, also claim on *quantum meruit* under an implied contract not shown to have been a contract implied in fact does not deprive the Court of Claims of jurisdiction to adjudicate the claim and render judgment for damages proven for breach of the written contract if the damages so proven are within the fair scope of the facts alleged in the petition. *United States* v. *Behan*, 110 U. S. 338, 347; *John Hays Hammond* v. *United States*, 95 C. Cls. 464, 470; *Electric Boat Company* v. *United States*, 66 C. Cls. 333, 377; *Hampton*,

CONTRACTS—Continued.

the contract nor increase his cost of performance. See *Restatement of the Law of Contracts*, sec. 315; *Williston on Contracts*, sec. 1293 A; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551. *Id.*

L. Where the contracting officer and head of department decided that the Government had fully performed its obligations under the contract in suit; it is *held* that such decision is not a final decision such as was contemplated under Article 15 of the contract so as to preclude suit in the Court of Claims on the legal rights of the contractor. *Id.*

LI. Agreements made in advance of the controversy which deprive a party to a contract of recourse to the courts are void. *Insurance Co.* v. *Morse*, 20 Wall. 445, and subsequent similar cases cited. *Id.*

LII. It is not uncommon in construction contracts to agree that the decision of the architect or engineer shall be final on such questions as to the proper interpretation of the plans and specifications, the measurement of the work done, causes and extent of delay, and similar questions of fact, but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determination of that question and for enforcement of rights thereby accruing have never been upheld. (See *Kihlberg* v. *United States*, 97 U. S. 398, and similar cases cited.) *Id.*

LIII. An agreement to leave to the party who drew the contract the determination of whether or not the contract had been breached would be contrary to the Act of Congress (U. S. Code, Title 28, section 250), whereby the United States consents to be sued in the Court of Claims on all claims founded upon "any contract, express or implied, with the Government of the United States." *Id.*

LIV. Under a contract dated January 8, in which it was stated that the contract period was January 8–March 16, where the contract was signed by the plaintiff on January 29 and by the Government on February 8, the agreed time for performance

CONTRACTS—Continued.

LVIII. On the facts as set forth in the findings, and under the provisions of the contract and the assignment; it is *held* that plaintiff, assignee, is entitled to recover only $3,898.67, representing the difference between $7,132.02, the unexpended balance of the total contract price, including the amount of $19,622.98, on completion of the contract; and $3,233.35, the actual damages sustained by the defendant on account of delay caused by the contractor between September 1 and December 22, 1941, the date on which the work was completed under a separate contract. *P. W. & B. R. R. Co.* v. *Howard*, 13 How. 307; *Phillips & Colby Construction Co.* v. *Seymour et al.*, 91 U. S. 646. *Id.*

LIX. Under the Assignment of Claims Act of 1940 (54 Stat. 1029), plaintiff by its assignment from the contractor could acquire no greater rights in respect of payments or claims arising under the assigned contract than its assignor, the contractor, had; and it may not, therefore, recover any more than the contractor could have recovered in the absence of the assignment. *Id.*

LX. Where, under the provisions of the contract, it was required that partial payments must be approved by the contracting officer; and where, on account of the contractor's failure of performance, the contracting officer's refusal on October 7 to approve a partial payment for work to that date, was not a breach of the contract; it is *held* that neither the contractor nor the assignee is entitled to recover on account of the work performed more than the unpaid contract price less the cost of completing the work plus the damages sustained by the defendant. *John M. Whelan & Sons, Inc.*, v. *United States*, 98 C. Cls. 601. *Cf. The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198. *Id.*

LXI. By terminating the contractor's right to proceed the Government waived its right to collect liquidated damages, *United States* v. *American Surety Co.*, 322 U. S. 96, but it did not waive or lose its right to claim and recover actual damages due to the contractor's default. *American Surety Co.* v. *United States* 136 Fed. (2d) 437. *Id.*

JURISDICTION—Continued.

diction of the Court of Claims as "to subject matter and character." *Id.*

VI. Section 155 of the Judicial Code (U. S. Code, Title 28, section 261) denies to an alien, who does not show the reciprocal right to sue in the courts of his country, consent to sue on any claim in the Court of Claims unless the statute (Section 145 of the Judicial Code; U. S. Code, Title 28, section 250) consenting to the suit on his particular type of claim is interpreted as not being limited by Section 155. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, distinguished. *Choremi* v. *United States*, 28 Fed. (2d) 913, cited. *Id.*

VII. Under the provisions of the Act of June 25, 1938, and of the Act of June 16, 1934, the Court of Claims has jurisdiction only of such claims as were presented within the limitation period defined in section 4 of the 1934 Act, which required that claims should be filed within 6 months of the date of approval of the 1934 Act, or, at the option of the claimant, within 6 months after the completion of the contract, unless the time was extended by the Comptroller General. *Riethmiller*, 495.

VIII. Mere notice of intention to do what the 1934 Act required cannot toll the statute. *Werner* v. *United States*, 86 Fed. (2d) 113; *Waters, et al.*, v. *United States*, 12 Fed. Supp. 658,660. *Id.*

IX. Where the 1934 Statute required that a claim to be filed thereunder should be verified and should itemize the additional cost claimed; and where the alleged claim filed in the instant case within the 6-month period was neither verified nor itemized, it is *held* that the statute has not been complied with and that a later claim, verified and itemized, which was filed about 2 years later was not timely, since the Comptroller General, who was the only one authorized to grant an extension of time, had not done so. *Douglas Aircraft Co.* v. *United States*, 95 C. Cls. 745. *Id.*

X. Where an agent of the Government, not authorized to do so, led the plaintiff to believe that plaintiff's letter stating the intention to file a claim for increased cost due to the National Industrial Recovery Administration Act was a

PATENTS—Continued.

monetary advantage between the revetment patent in issue and the launching apparatus patent which the Government by virtue of its contribution was empowered to use; and (3) ascertaining from the total monetary value of the revetment patent to the Government what proportion thereof constitutes a just and reasonable compensation to plaintiff. *Olsson* v. *United States*, 87 C. Cls. 642, 659; *Mamie C. Wood et al* v. *United States*, 36 C. Cls. 418, 426, cited. *Id.*

V. Under the provisions of the special jurisdictional act, interest is included not as interest but as part of the entire compensation in accordance with *Harry F. Waite*, v. *United States* 69 C. Cls. 153; 282 U. S. 508. *Id.*

VI. It is *held* that the Norris patent, #1,726,500, on sound-deadening construction is invalid for lack of novelty, having been anticipated by the British patent to Stevens, #4,843, of 1887, and by "The Dynamical Theory of Sound," published in 1925 by Horace Lamb. *Burgess Battery Company*, 676.

VII. That the patent in which prior disclosure appeared is a foreign patent is immaterial under section 31 of Title 35, United States Code. *In re Cross*, 62 Fed. (2d), 182; *Becket* v. *Coe*, 98 Fed. (2d), 332. *Id.*

VIII. The only feature of the Norris patent in suit which differs from prior patents had been anticipated by the Lamb publication. See *Freyn Engineering Co.* v. *Coe*, 79 Fed. (2d), 134. *Id.*

IX. The case of *Burgess Laboratories, Inc.* v. *Coast Insulating Corp.*, 27 Fed. Supp. 956, in which the U. S. District Court held claim 4 of the Norris patent valid, is distinguished for the reason that the Stevens patent and the Lamb publication were apparently not relied on in that case. *Id.*

PAY AND ALLOWANCES.

I. It is *held* that plaintiff, a bachelor officer in U. S. Navy, with dependent mother, is entitled to recover increased rental and subsistence allowances for the period from June 1, 1939, to May 10, 1941, where it is not disputed he was his mother's chief support during such period, and until his marriage. *Reichel*, 420.

PAY AND ALLOWANCES—Continued.

II. Where it is found as a fact that plaintiff, a bachelor officer in the Quartermaster Corps Reserve, United States Army, on active duty, is the chief support of his mother; and where during the period of the claim quarters furnished to the plaintiff were, under the statutes and regulations, not adequate quarters for an officer of his rank with a dependent; and where during such period plaintiff did not receive any money allowance in lieu of quarters; it is *held* that plaintiff is entitled to recover the claimed money allowances for rental and subsistence provided by law for an officer of his rank with a dependent mother for the period June 1, 1941, to June 1, 1942, under the Act of June 10, 1922, as amended by the Act of May 31, 1924, and the regulations issued thereunder by the President, and is further entitled to recover such allowances subsequent to June 1, 1942, under the Act of June 16, 1942. See *Donald K. Mumma v. United States*, 99 C. Cls. 261. *Brown*, 427.

III. Under the applicable statutes and the pertinent regulations thereunder, it is required not merely that an officer with dependent should receive either the money allowance for quarters, as fixed by statute for an officer of his rank, or be furnished the number of rooms so fixed, but also that such quarters, if furnished, must be adequate for occupancy by himself and his dependent. *Id.*

IV. Following the decision in *Mumma v. United States*, 99 C. Cls. 261, value of quarters assigned to Army officer, which are inadequate for officer of his rank, may not be deducted from the amount due for rental and subsistence allowance on account of dependent mother. *Doyle*, 491.

V. An acting assistant surgeon of the Navy, serving under a temporary appointment under the provisions of the act of Congress of May 4, 1898 (U. S. Code, Title 34, section 21), is not entitled to retirement for physical disability incurred as an incident of the service under the provisions of sections 411, 415, 416, 417 of Title 34, U. S. Code. *Cook*, 782.

VI. Where the actions taken by the Navy Department, the Naval Retirement Board and the President at the instance of the Secretary of the

REFORMATION OF CONTRACT.
See Contracts XXI.
REMITTANCE NOT A DEPOSIT.
See Taxes XXV.
RENTAL OF EQUIPMENT.
Where the Government rented from the plaintiff a road machine for use on a Civil Works Administration project under an agreement that payment of rental would be made, on a pay-roll basis, to the operator of the machine, and not to the owner; and where the plaintiff agreed to and acquiesced in this method of payment; and where the evidence does not show to whom the payments, if any, were made during the period covered by the instant claim; it is *held* that it was the plaintiff's responsibility to know who the operator was and to obtain from him the plaintiff's part of the pay, and the plaintiff is not entitled to recover from the Government what he may have failed to collect from the operator of the machine. *Smith*, 743.
See also Contracts XXII.
REVETMENT.
See Patents I, II, III, IV.
REVISED STATUTES, SEC. 1086.
See Fraud II.
RIGHT TO SUE.
I. An agreement made in advance of the controversy which deprives a party to a contract of recourse to the courts is void. *Insurance Co.* v. *Morse*, 20 Wall. 445, and subsequent similar cases cited. *B-W Construction Company*, 748.
II. An agreement to leave to the party who drew the contract the determination of whether or not the contract had been breached would be contrary to the Act of Congress (U. S. Code, Title 28, section 250), whereby the United States consents to be sued in the Court of Claims on all claims founded upon "any contract, express or implied, with the Government of the United States." *Id.*
SPECIAL JURISDICTIONAL ACTS.
I. Section 3 of the special jurisdictional act (49 Stat. 1085, amended 52 Stat. 208) which provides that "at the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States" does not render the act unconstitu-

TAXES—Continued.

Income Taxes—Continued.

providing a credit against corporation taxes, was to avoid penalizing a corporation for failure to distribute its earnings when it could not distribute them without violating an agreement previously made. *Lehigh Structural Steel Co.* v. *Commissioner*, 127 Fed. (2nd) 67, reversing the Board of Tax Appeals, 44 B. T. A. 22, cited. *Id.*

III. (3) In the instant case, the provisions of section 26 (c) (1) are applicable to the agreement which the plaintiff corporation made with its preferred stockholders and which was evidenced by the certificates issued to them; since the agreement was a real agreement, upon the basis of which the preferred stock was purchased, and it was not intended as a means of evading taxes. *Id.*

IV. (4) In *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, the Supreme Court could hardly have intended to read into section 26 (c) (1) a limitation of the written agreement there mentioned to agreements with creditors, when the court's language was directed to section 26 (c) (2), which expressly deals only with agreements requiring that earnings be set aside for the "discharge of a debt." *Id.*

V. (5) Where plaintiff, in 1933, agreed in its preferred stock certificates that it would not declare dividends on its other classes of stock until it had made provision, out of its earnings or surplus, for a retirement fund for the preferred stock; it is *held* that it was not the intention of plaintiff to include in the word "surplus," as there used, the values which it had previously earned but had capitalized by declaring stock dividends in 1920 and in 1928, although it had in 1933, as a part of the same transaction with the making of the agreement changed its common stock from par value to no par value. *Id.*

VI. (6) Plaintiff was entitled to the credit claimed, under section 26 (c) (1); the assessment made by the Commissioner against plaintiff's income as a surtax on undistributed net income for the year 1936 was erroneous and plaintiff is entitled to recover. *Id.*

VII. (7) Under section 208 (a) (8) of the Revenue Act of 1926, in determining capital gain, the period during which stock of a holding company has

TAXES—Continued.

Income Taxes—Continued.

ratio of any part of the subsidiary's profits in those years to the parent company's profits for the taxable year 1933. *Id.*

XVII. (17) The statutory ratio is dividends to the entire net income in which the dividends are included, the purpose being to prevent the dividend income from being taxed at a lesser rate than the other income of the parent corporation. *Id.*

XVIII. (18) The purpose of the provision for credit was to prevent double taxation. *American Chicle Co.* v. *United States*, 316 U. S. 450; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1. *Id.*

Oil Transportation Tax.

XIX. (1) Where Federal pipe line transportation taxes were assessed against the plaintiff on the conveyance or transportation of its own oil, both crude and refined, from its own tanks on its own premises through its own lines of pipes into vessels at its own wharfs; it is held that such taxes were properly assessed under section 731 of the Revenue Act of 1932, which levies a tax "upon all transportation of crude petroleum and liquid products thereof by pipe line," such service being customarily performed by a pipe line carrier, and plaintiff is not entitled to recover. *Magnolia Petroleum Company*, 1.

XX. (2) In the instant case, although no charge was actually made or collected on the conveyance of oil from plaintiff's storage tanks to vessels, the tax was properly levied upon the basis of the charges usually made by pipe line companies for such services, as provided by the statute. (47 Stat. 275.) *Id.*

XXI. (3) It was plainly the purpose of Congress to tax movements through privately owned facilities as well as those over common carrier pipe lines, partly for the purpose of avoiding giving advantage, by way of exemption from the tax, to persons owning their own facilities. (*McKeever* v. *Fontenat*, 104 Fed. (2nd), 326, cited.) *Id.*

XXII. (4) Although under the Treasury Regulations (Article 26 of Regulations 42 promulgated under the 1932 Revenue Act, transportation of oil which is incidental to a business engaged in by the

VETERANS' DISABILITY BENEFITS.

I. Under the provisions of the statutes relating to veterans' compensation, it is *held* that compensation which has been duly awarded by the Veterans' Administration to a veteran of World War I for disability incurred in line of duty may not be withheld for the payment of the claim of any creditor, including any fine imposed upon such veteran by the courts of the United States. (U. S. Code, Title 38, section 426). *McElhany*, 286.

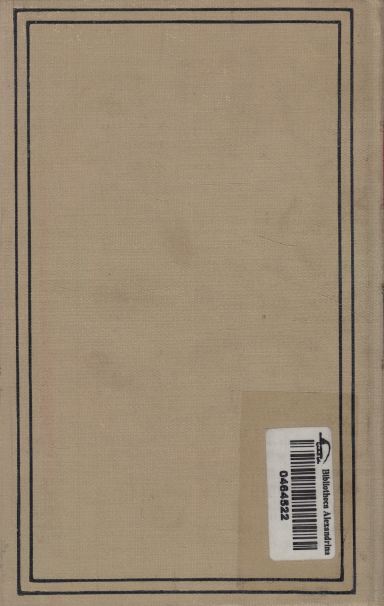
II. Payments admittedly due to a beneficiary under a War Risk Insurance policy are exempt from all claims of creditors, including any claim of the United States of any character, except a claim arising under the Veterans' Benefit acts. 49 Stat. 607, 609. *Id.*

III. Claims of the United States, as much as the claims of private creditors, come within the purpose of the veterans' statutes, which purpose is to preserve solely for the support of the veterans the benefits conferred by such statutes. *Id.*

IV. Only claims arising under the veterans' benefit statutes are excluded from the exemption conferred by such statutes. *Id.*

V. The veterans' benefit statutes confer exclusive jurisdiction upon the Veterans' Administration on all questions of law and fact "concerning a claim for benefits" under these statutes but where a veteran's claim for benefits has been adjudicated by the Veterans' Administration, and its decision accepted by the veteran; and where the payments due under such decision are withheld by the Government on account of a claim other than one arising under the benefit statutes, the courts have jurisdiction of

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